***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

382A

# BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,772

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UNITED STATES OF AMERICA, Appellee,

v.

ARTHUR B. KNIGHT, Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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MICHAEL MULRONEY
Counsel for Appellant
(Appointed by the Court)

Cr. No. 525-70

# I N D E X

CITATIONS:

Cases:

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* Cases or authorities chiefly relied upon are marked by asterisks.

## ISSUES PRESENTED FOR REVIEW

In the opinion of appellant the following issues are presented:

1. Whether a defendant can be convicted simultaneously for mail robbery and armed robbery arising from the same occurrence.

2. Whether the court properly barred defense counsel from cross-examining a key prosecution witness on whether he was an accomplice in the crime where it was apparent that there was an unknown accomplice, and where there was a reasonable possibility that the witness was involved with the guilty defendants.

3. Whether the defendants' motion to sever should have been granted as to this appellant.

4. Whether the trial court improperly prevented defense counsel from introducing testimony concerning the nature of the place where the robbery was planned when such testimony would have tended to show that the appellant's presence there was, or could have been innocent presence.

5. Whether the court erred in giving standard jury instructions on complicity and a defendant's own testimony in conjunction with each other.

6. Whether the court erred in declining to modify the standard jury instruction on aiders and abettors to include a statement to the effect that a defendant must designedly encourage the commission of the crime in order to aid and abet.

7. Whether the court erred in permitting the introduction of evidence to corroborate the unimpeached portion of the testimony of the key prosecution witness.

References to Rulings:

None.

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This case has not previously been before this Court under any other name or title.

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No. 24,772

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# BRIEF FOR APPELLANT

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## STATEMENT OF THE CASE

A. Proceedings Below, Jurisdiction.

On March 25, 1970, appellant was indicted on five counts: robbery of a person having charge of mail matter of the United States;[1/] kidnapping;[2/] armed robbery;[3/] robbery;[4/] and assault with a dangerous weapon.[5/] He pleaded not guilty to all counts on April 16, 1970. (Original Record on Appeal 6)[6/]

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1/ 18 U.S.C. §2114.
2/ 22 D. C. Code §2101.
3/ 22 D. C. Code §3202.
4/ 22 D. C. Code §2901.
5/ 22 D. C. Code §502.
6/ The Original Record on Appeal is hereinafter referred to as "R.____".

Appellant was tried together with three co-defendants[7] before a jury in the United States District Court for the District of Columbia. The 11-day trial began June 1, 1970 and ended June 15, 1970. Judge John H. Pratt presided. At the close of the evidence the court dismissed the kidnapping charge (Transcript of Testimony 1824-1825)[8]. The jury found appellant guilty on the mail robbery and armed robbery counts and not guilty on the charges of assault with a dangerous weapon (R. 44).

On September 23, 1970, appellant was sentenced to concurrent sentences of 3 to 10 years on the mail robbery count and 4 to 12 years on the armed robbery count (R. 52). This appeal followed (R. 50).

The jurisdiction of this Court derives from 28 U.S.C. §§1291 and 1294.

B. Statement of Facts.

1. Summary.

On December 23, 1969, a mail truck was robbed while on its regular route in Washington City. The contents of a

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7/ Haywood Kirkland, Robert T. Johnson and John H. Bowman were tried concurrently under a joint indictment (R. 41). Kirland and Johnson were convicted on all four counts (R. 44). Their appeals are pending before this Court as No. 24,899 and No. 24,773, respectively. Pursuant to an order of this Court dated May 6, 1971, those two appeals were consolidated with this one for all purposes. Bowman was acquitted (R. 44).

8/ The Transcript of Testimony is hereinafter referred to as "Tr.____."

mail sack were taken. It contained packages which had about $382,000 in currency. The currency was being returned from abroad for destruction. It was apparent that the thieves knew the money was on that particular mail truck. At least one weapon was brandished during the course of the robbery. (Tr. 363-364, 378-387, 393-397)

The thieves forced the two Post Office employees riding the mail truck into the back, then drove the truck several blocks to a rendevous. There, the parcel containing the currency was taken by the robbers who fled. At the scene a witness saw several men jump from the mail truck and run to a U-Haul truck parked nearby. The men entered the U-Haul truck and drove away. (Tr. 393-397, 1386-1389)

The appellant rented the U-Haul truck the day before the robbery. The day of the theft, he reported to the police that the truck had been stolen. (Tr. 1572-1573, 1593-1595)

2. The robbery.

Appellant was one of several shareholder-proprietors of Community Sales and Services Corporation. Community Sales and Services operated The African Hut, a community gathering place[9/] in the Dunbar Hotel at 15th

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9/ The African Hut is termed a "community gathering place" here because it was somewhat unconventional. It was a bar or lounge in the normal sense, but it was also used extensively as an informal gathering place for persons of the community for public non-profit affairs such as putting together Christmas baskets for the needy of the neighborhood. (Tr. 1475, 1479-1480, 1576)

and U Streets, N. W. The appellant managed the African Hut. His co-defendants Kirkland and Johnson were also active in the affairs of the African Hut. Co-defendant Bowman sometimes visited there. Calvin Jones, the principal prosecution witness, also visited the African Hut on occasion. (Tr. 1015-1017, 1474, 1491)

At trial, Jones admitted that he was one of the three who hijacked the mail truck. The other two, he testified, were Kirkland and Johnson. Bowman drove the get-away vehicle. Jones testified that the appellant, Arthur Knight, participated in planning the theft and rented the U-Haul truck for the purpose of the robbery. (Tr. 1012-1043)

According to Jones' testimony the robbery was planned over a period of weeks when the persons named as participants came together from time to time at the African Hut. Jones was not in on the initial planning. However, when one of the original participants was unable to join in the endeavor, Jones was drafted by Kirkland who had known Jones since high school days. (Tr. 1012-1043, 1079)

Jones testified that at about 6:30 a.m., on December 23, 1969, he, Johnson, and Kirkland went to the HOLC Building at 101 Indiana Avenue, N. W. They anticipated that a mail truck would arrive there shortly thereafter. If the mail truck had two men in it, they understood that it would be carrying parcels of currency. (Tr. 1021-1033, 1162)

Jones said that the truck appeared with two men aboard. When it backed to the loading dock the driver got out and the second man opened the truck's back door. At that point Jones and Johnson entered the back of the truck. Jones was carrying a rifle. Johnson asked the man in the truck: "Which one's got the money?" The man pointed out the mail sack which held currency. (Tr. 380-384, 1034-1035).

According to Jones, Kirkland then arrived at the back of the truck with the driver. The driver was forced into the back of the truck. The mail truck was driven to a parking lot at First and DeFrees Street, several blocks away. En route one of the thieves remembered to relieve the guard of the gun he was carrying. The thieves took the parcel which contained the currency and fled in a U-Haul truck which was parked at the rendevous. (Tr. 396, 1032, 1035-1037, 1160-1162, 1386-1388)

The testimony of the mail truck driver, Andrew Arnold, and the mail guard, David W. Rice, Jr., substantially paralleled that of Jones from the time the robbers appeared until they left the mail truck. Admonished by the thieves not to leave the truck for 15 minutes, they hesitated and neither saw the robbers depart. However, an employee at the parking lot testified that he saw several men run from the mail truck to a U-Haul truck parked nearby, enter the U-Haul truck and depart. A U-Haul truck matching the description

he gave was later found abandoned in the 1400 block of 12th Street, N. W. (Tr. 377-397, 461, 529-551, 1386-1388)

Jones' testimony incriminating the appellant, Knight, was positive. Jones said he knew Knight from having seen him on several occasions at the African Hut. He testified that Knight had participated in planning the affair during one or more sessions at the African Hut. According to Jones, it was arranged that Knight would rent a truck to be used as a getaway vehicle. Knight was to report it stolen if the robbers had difficulty. (Tr. 1015, 1019-1020, 1036, 1032, 1196, 1241-1243)

Jones indicated that Knight did in fact rent the truck on December 22, 1969, the day before the robbery. According to Jones the truck was used by the thieves later that morning to make a reconnaissance of the proposed robbery site. The following day the same truck was used in the robbery. (Tr. 1021-1027, 1241-1243)

Cross-examination developed that Jones had made a number of prior inconsistent statements, including several to the effect that the appellant was not involved in the robbery. None of the prior statements was inconsistent with the fact that he was at the robbery scene, however. (Tr. 1098-1109, 1123-1124, 1129-1132, 1134, 1136, 1138-1142, 1149-1154, 1171-1174, 1191-1192, 1198-1202, 1205-1212, 1246-1250)

Kirkland and Johnson did not testify on their own behalf. Knight did.[10/] He indicated that he rented a U-Haul truck on December 22, 1969, for the purpose of transporting some furniture from a church to the African Hut, to distribute Christmas baskets to needy persons in the neighborhood, and to move some bulky trash from his home. (Tr. 1572-1576)

Knight went on to testify that after he rented the truck, he drove it home, parked it on the street, and went to bed. Later that morning, he drove it to the African Hut. On several occasions during the day, the truck was borrowed by acquaintances for errands. That night, he drove the truck home and parked it on the street around the corner from his home, leaving it unlocked. (Tr. 1576-1592, 1614-1630)

Knight testified that the following morning, December 23, 1969, he discovered the truck was not where he had left it. He went to the rental agency to determine whether they had reclaimed it. He discovered they had not and reported the missing vehicle to the police. A friend, Ben Tyree, substantiated Knight's testimony. (Tr. 1593-1595)

The evidence showed that the U-Haul truck rented by Knight was the truck used by the thieves. (Tr. 461-463)

The evidence also showed that within a few days after the robbery Mrs. Knight made overdue payments of

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10/ Bowman also testified on his own behalf.

$400 on their home mortgage, and that the four Knight children were each given a new bicycle. Mrs. Knight explained that she paid the amounts out of her savings. (Tr. 1561-1563, 1632)

## ARGUMENT

## I

## APPELLANT WAS IMPROPERLY CHARGED AND CONVICTED OF MAIL ROBBERY AND ROBBERY FOR THE SAME ACT. */

Appellant was charged, convicted, and sentenced for mail robbery[11/] and for armed robbery.[12/]

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11/ The first count of the indictment charged (R.41):
On or about December 23, 1969, within the District of Columbia, the defendant *** Arthur B. Knight *** by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of David W. Rice, mail matter and money which was the property of the United States, in the lawful charge, control and custody of David W. Rice, consisting of about $382,000 in money, and in effecting such robbery, the defendant *** Arthur B. Knight *** put the life of David W. Rice in jeopardy by the use of dangerous weapons, that is, a pistol and a sawed-off shotgun.

18 U.S.C. §2114 (1964) provides:

> Whoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal or purloin such mail matter *** or robs any such person of mail matter, or of any money or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail matter *** or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

12/ The second count charged:
On or about December 23, 1969, within the District of Columbia, the defendant, Arthur B. Knight ***, while armed with dangerous weapons, that is, a pistol and a sawed-off shotgun, by force and violence and against resistance and by putting in fear, stole and took from

*/ (R. 41)

It was improper for him to be convicted and sentenced on both counts. There was only one offense committed. United States v. Spears (D.C. Cir. No. 23,043, decided February 16, 1971). The Spears opinion suggests that the District of Columbia armed robbery statute is, in effect, a lesser included offense vis-a-vis the federal mail robbery statute. (slip op. 16-17)[13/] That case controls here. Conviction on the second count under D.C. Code §3202 must be set aside.

The appellant was sentenced to concurrent terms of three to ten years on the mail robbery count and four to 12 years on the armed robbery count. Under Spears (slip op. 17, 19) the case should be remanded to the trial court for resentencing on the remaining count, should it be affirmed, to permit the trial court to take into account the fact that the appellant stands convicted of only one felony.

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the person and from the immediate actual possession of David W. Rice, property of the United States, in the care, custody and control of David W. Rice, consisting of about $382,000 in money. This is the same money which is mentioned in the first count of this indictment.

> 22 D.C. Code §3202 (Supp. III, 1970) provides:
> If any person shall commit a crime of violence within the District of Columbia when armed or having readily available any pistol or other firearm *** he may in addition to the punishment provided for the crime be imprisoned for an indeterminate number of years up to life as determined by the court ***.

Robbery is defined as a "crime of violence" by D.C. Code §22-3201 (Supp. III, 1970).

13/ This argument was presented to and rejected by the trial court before Spears was handed down. (Tr. 1862-1864)

II

THE TRIAL COURT IMPROPERLY BARRED DEFENSE COUNSEL FROM CROSS EXAMINING A KEY PROSECUTION WITNESS TO DEVELOP THE POSSIBILITY THAT HE WAS INVOLVED IN THE CRIME. */

A. Introduction

David W. Rice, Jr., was the armed escort for the valuable registered mail sack that was stolen. (Tr. 530-533, 571) Rice testified that he was the Post Office employee in possession of the mail matter, and that it was stolen. (Tr. 530-539, 578) The trial court ruled that Rice was the custodian of the stolen mail matter. (Tr. 1448-1449, 1887)

There was reason to believe that Rice assisted in planning the robbery. At the outset, as a postal employee from whom mail had been taken, Rice was under immediate suspicion. (Tr. 134) He testified that in his initial responses to the investigation of his possible complicity

he deliberately gave devious answers and concealed information. (Tr. 133-134) He was given a lie detector test. (Tr. 150-151) He was later assured that he was no longer a suspect. (Tr. 135)

However, other factors pointed to the possibility[14/] of Rice's complicity. It was apparent that the robbers

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14/ The discussion herein of the possibility of Rice's complicity is, of course, based solely on matters of record.

*/ (R. 41, 44; Tr. 133-135, 150-151, 207-208, 221, 384, 428-429, 530-539, 552-553, 565-566, 571, 578, 1004-1009, 1080-1086, 1448-1449, 1750-1759, 1887)

had inside knowledge not only that valuable property would be on that particular mail truck, but also that there would be currency on the truck. Thus, Andrew Arnold, the mail truck driver, testified that after he was forced inside the back of the truck, among the mail sacks piled there, he was asked by one of the robbers, "[W]hich one's got the money?" (Tr. 384) Arnold also testified that when Rice was forced into the back of the truck, Rice's assailant said, "Dammit, *** make sure you got the correct one." (Tr. 428-429) And Jones testified that Kirkland told him there was an "inside man" who was setting up the robbery. (Tr. 1080; see Tr. 1087-1088)

In addition, both the prosecuting attorney and the trial judge had knowledge of the possibility that Rice was involved in the crime, or with the defendants. The prosecutor indicated (Tr. 207-208, emphasis added):

> The results of the investigation by the Post Office personnel have led them to conclude that Mr. Rice is free of any complicity in this affair; that if he came in touch with it, he came in touch with it only as one who may have been approached or courted momentarily or passingly by fellow employees or other people in or out of the Post Office Department.
>
> I think I can state that he never bit on the bait, and we are confident of the truth of his testimony that he knew nothing about this offense *** This is as it was explained to me, but I'm sure that [the investigating postal inspector] would state categorically that this man has been investigated over and over, just as Mr. Arnold was, in all his associations and so forth, and it's conceivable that someone may

have seen Mr. Rice in company with some of these gentlemen I've mentioned on the periphery at one time or another, but we are convinced that there is nothing to it.

The court was aware that Rice may have been in contact with several of the defendants prior to the robbery, that Rice admitted visiting the African Hut, and that Rice had worked at the Post Office with Tommy Collins, alleged originally to have conceived the robbery plan. (Tr. 1084-1089, 1754-1756)

Also significant is that Rice was not relieved of his gun until well after the robbery was in progress (Tr. 552), and Jones felt confident in launching on an armed robbery without ammunition for his gun. (See Tr. 1081)

Against that backdrop, Rice was asked whether he had ever conversed with the robbers prior to the confrontation in the mail truck. He answered, "No." (Tr. 553)

Defense counsel attempted to cross examine Rice on the fact of his complicity (Tr. 565-566), and to elicit Rice's complicity from Jones. (Tr. 1082-1086) The court would not permit it. (Tr. 566, 1085-1086)

To bolster the showing of Rice's complicity, defense counsel attempted to find a witness who could indicate that Rice was involved. That witness was located. To protect the rights of the putative witness the court, properly, assigned him counsel to advise him of his rights. Following such advice, the witness declined to testify. (Tr. 1750-

1751) However, defense counsel indicated at a bench conference that the witness would have testified to Rice's involvement. (Tr. 1083-1085)

The court barred defense cross examination of Rice's involvement. Absent cross examination, defense counsel attempted to proffer for the record the information which had been gleaned out of court from the prospective witness about Rice's supposed involvement in the crime. The trial court would not permit the proffer to be made out of the presence of the jury. (Tr. 1750-1759)

B. Cross examination of the suspect witness should have been granted in all events.

The first count charged the appellant with mail robbery. The statute indicates that the offense occurs when the offender "Assaults any person having lawful charge, control or custody of any mail matter *** or robs any such person of mail matter ***". (18 U.S.C. §2114 (1964)) The indictment charged that the appellant "stole and took from the person and from the immediate actual possession of David W. Rice, mail matter ***" (R. 41) The jury's special verdict found the appellant guilty of "Robbery of United States Mail Matter and Money from the Lawful Charge and Custody of David W. Rice." (R. 44)

The statute requires that the theft be from a person.

If Rice was an accomplice, there could be no theft from him and the indictment, which named only Rice and not Arnold, was faulty, as the court seemed to recognize. (Tr. 221)

There was adequate basis in the record to justify examining Rice on this point. The prosecuting attorney virtually admitted that there was evidence to show that Rice had prior contact with the robbers. (See Tr. 207-208, set forth above.) The court's position was that it was necessary to show Rice's involvement by extrinsic evidence before he could be examined directly. (Tr. 565-566, 1750) The best evidence of Rice's involvement would have been Rice's own testimony. It was improper for the court simply to assume that Rice would deny involvement. Even if he did deny involvement there were grounds on which that denial might be impeached. The fact that he deliberately gave devious answers and concealed information to protect himself when he was first investigated could have been brought out to be weighed by the jury in considering this denial.

Great latitude is to be given defense counsel in cross examination of a witness who has a possible stake in the case. See Wheeler v. United States, 351F.2d 946 (1st Cir. 1965); Austin v. United States, 135 U.S. App. D.C. 240, 418 F.2d 456, 459 at n. 17 (1969). That latitude

was denied here.

In any event, if defense counsel were properly barred from cross-examining Rice on this point, his direct examination should have been stricken.

## III

## THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR SEVERANCE.*/

Counsel for Kirkland (Tr. 4-5) and Johnson (R. 36) moved that trial of their defendants be severed from that of the appellant and Bowman. From appellant's standpoint, those motions should have been granted. He was prejudiced in two ways. First, his trial counsel was prevented from arguing to the jury the significance of the appellant's willingness to testify in contrast to the absence of testimony from Kirkland and Johnson, and the resulting jury instructions were confusing. Second, the appellant was tarred by the lurid brush of the post-robbery antics of his supposed cohorts, when none of their activities was pertinent to his alleged participation.

At the pre-trial hearing on the motion to sever, the prosecuting attorney requested the court to admonish the appellant's counsel to avoid reference to the absence of testimony by Kirkland and Johnson. (Tr. 16) The court

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*/ (Tr. 4-5, 12, 16, 18, 26-27, 113-115, 686-690, 723-726, 737-783, 1015-1017, 1050-1054, 1074-1078, 1119-1120, 1168, 1412, 1460, 1843, 1878, 1882; Supp. Tr. 237-249)

responded by prohibiting any such reference. (Tr. 13, 26-27, 1843) None occurred. (Supp. Tr. 237-249)[15/] At the close of trial the court instructed that Kirkland and Johnson had a right not to testify and that no inference of guilt was to be drawn from their silence. The court also instructed that if a defendant did testify, the jury should consider the defendant's interest in the outcome of the case. (Tr. 1878)

Even though it was not the trial tactic of appellant's counsel to shift blame from appellant to his co-defendants, nonetheless, he had the right to explore fully with the jury the appellant's willingness to testify in his own behalf. He was handicapped in the performance of that right by not being allowed to contrast appellant's forthrightness to the silent defendants' reticence. See DeLuna v. United States, 308 F.d 140, 143 (5th Cir. 1962) reh. den., 324 F.2d 375.

The conflicting interests of the vocal and silent defendants was perpetuated in the court's instructions to the jury. On one hand, the jury was told that the right of a defendant to remain silent was not to be held against him. In the next breath the jury was instructed that if a

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15/ The volumes of the Transcript of Testimony of June 3, 1970, and June 12, 1970, which contains the opening statement and closing arguments will be referred to herein as "Supp. Tr. _____".

defendant did venture to testify the jury could consider that he had a vital interest in the outcome of the case, and should so weigh the testimony. Absent the ability of defense counsel to capitalize on the willingness of the appellant to testify, those instructions weighed heavily against the vocal defendant, Knight.

There is an even more compelling reason for severance. Of the evidence introduced during the 11-day trial, relatively little applied to the appellant. The testimony pertinent to him was simply the fact of the robbery, his rental of the truck, Jones' testimony of his involvement, and his own testimony denying it. However, the road to his conviction was not so prosaic as that. In the absence of severance, the appellant sat before the jury shoulder to shoulder with Kirkland, Johnson, and, in effect, Jones, while the jury heard:

(i) That Kirkland, Johnson and the appellant were close acquaintances, and that they associated with Jones as well. (Tr. 1015-1017);

(ii) That his alleged confederate Johnson was arrested in Montreal, Canada, while living there in an apartment with a woman (Tr. 686, 724-726);

(iii) That Johnson had with him a small arsenal which included an M-1 rifle on which he was lying when he was arrested, a pistol and a substantial quantity of ammunition, all of which were exhibited to the jury (Tr. 687-690, 723-724);

(iv) That another confederate, Kirkland, was arrested with a stack of fifty and one hundred dollar bills derived from the robbery, and others were found at his apartment (Tr. 737-738);

(v) That a third confederate, Jones, traveled to California and Hawaii, part of the time in the company of Johnson's wife, and when arrested, he and Mrs. Johnson had a quantity of narcotics and a rifle (Tr. 1050-1054, 1074-1078, 113-115, 1119-1120, 1168); and,

(vi) That the money from the robbery was physically divided among Kirkland, Johnson and Jones on Kirkland's kitchen table. (Tr. 1043-1044)

The foregoing, none of which pertained to Knight's supposed participation, must have tended strongly to establish Knight's guilt by association. The trial court stated forthrightly that the case against Knight was the weakest of the lot. (Tr. 1412, 1460) In those circumstances, severance was required. See United States v. Kelly, 349 F.2d 720, 759 (2d Cir. 1965); and see McHale v. United States, 130 U.S. App. D.C. 163, 398 F.2d 757, 758 (1968), cert. den., 393 U.S. 985; Gregory v. United States, 125 U.S. App. D.C. 140, 369 F.2d 185, 189 (1966).

Even though cautionary instructions were given (Tr. 687, 1882), they were not adequate to undo the harm. See United States v. Branker, 395 F.2d 881, 889 (2d Cir. 1968).

The necessity for severance could reasonably be ascertained from the outset. The record indicates that the trial court was quite familiar with the case. (Tr. 12) However, even if that were not so, once the motion to sever was before the court, its duty to consider it was a continuing one. Schaffer v. United States, 362 U.S. 511, 516 (1960) (dictum). Here, there were no substantial administrative reasons to deny severance. A separate trial of the appellant would have consumed little additional time.

## IV.

## THE TRIAL COURT UNDULY RESTRICTED THE EFFORTS OF APPELLANT'S COUNSEL TO DEVELOP APPELLANT'S CASE.*/

According to Jones' testimony, the African Hut was the focal point for the robbery. There, he testified, he saw the appellant and the other three defendants. (Tr. 1015) There, he said, the robbery was planned. (Tr. 1018-1020) There, he indicated, the appellant agreed to procure the get-away truck. (Tr. 1020) And there, he stated, they expected to return after the robbery (although unaccountably the appellant was not present after the robbery). (Tr. 1041-1042)

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*/ (Tr. 1015, 1018-1020, 1042-1042, 1476-1479, 1600-1601)

The appellant's trial attorney attempted to counter the impression that the African Hut was a sleazy dive and a fertile place for conspiracy, which raised the necessary implication that its manager, the appellant, would naturally participate in plots hatched there. He tried to show that the appellant affirmatively attempted to make the African Hut a community gathering place and a center for proper and productive neighborhood activity.

The court declined to let defense counsel pursue the matter. Upholding the prosecutor's objections, the court ruled the testimony irrelevant. (Tr. 1476-1479, 1600-1601). Those rulings improperly impeded the defense showing that the appellant's surroundings were harmless rather than iniquitous.

V.

ERROR IN JURY INSTRUCTIONS.*/

A. Prejudicial Juxtaposition of Instructions.

The court's instruction on testimony by an accomplice and on the testimony of a defendant followed one another closely. (Tr. 1878) Both applied to the appellant Knight. Under the complicity instruction the jury was cautioned that the appellant's testimony "should be received with caution and scrutinized with care." Under the defendant-testimony

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*/ (Tr. 1412, 1460, 1868, 1878, 1900-1902; Supp. Tr. 208-209)

instruction, the jury was further cautioned that while the appellant's testimony was not to be disbelieved "merely" because he was a defendant, nonetheless the jury was to consider that the appellant had a "vital interest in the outcome of the trial." (Tr. 1878)

Both instructions, standing alone, were standard. Given back-to-back, however, in what the court considered a close case (see Tr. 1412, 1460), the jury found itself doubly cautioned about the appellant's testimony.

The dilemma created is that if the jury tended to believe Knight, even though he was a defendant, because he was an accomplice they were required to receive his testimony "with caution". On the other hand, if they viewed the appellant first as an accomplice, but nonetheless accepted his testimony as such, they were immediately reminded that as a defendant he had a vital interest in the trial.

The burden on the appellant resulting from the unqualified accomplice instruction was too great. The accomplice instruction should have been limited in its application to Jones only. In the absence of such limitation, error resulted.

B. Aiding and Abetting Instruction Did Not Include Crucial Language.

The government proceeded against appellant on an aiding and abetting theory. (Supp. Tr. 208-209) The court gave the standard aiding and abetting charge. (Tr. 1900-1902) Appellant's defense counsel requested that the instruction be modified to include the statement that even if the defendant knew that his conduct might facilitate the commission of a crime, that would not suffice if he did not wilfully associate his conduct with the criminal endeavor. That request was improperly denied. (Tr. 1868)

To be an aider and abettor it is necessary that the defendant "designedly encourage" the commission of the crime, for a culpable purpose is required. See Bailey v. United States, 135 U.S. App. D.C. 95, 416 F.2d 1110, 1113 (1969); see also, United States v. Harris, _____ U.S. App. D.C. _____, 435 F.2d 74, 88 (1970). The defendant must know that a crime is to be committed and make some conscious effort to assist in the criminal project. Allen v. United States, 103 U.S. App. D.C. 184, 257 F.2d 188, 190, (Washington, J., dissenting) (1958). That conscious, affirmative act must be undertaken with the intent that the act does so assist, and thus become a part of the criminal endeavor, i.e., he must act with "guilty knowledge".

See Kemp v. United States, 114 U.S. App. D.C. 88, 311 F.2d 774, 775 (1962); Jones v. United States, 131 U.S. App. D.C. 212, 404 F.2d 212 (1968).

While the standard instruction has been approved in other cases, e.g., Allen v. United States, supra, it was not adequate in the circumstances of this case. If the appellant rented the truck, knowing that the crime would be committed, but not for the guilty purpose of providing the robbers with the truck, the requisite conscious effort was absent. The standard instruction applied in this case does not reach that result. It was error to deny the requested amendment to the instruction.

## VI

## THE COURT ERRED IN PERMITTING THE PROSECUTION TO INTRODUCE EVIDENCE TO CORROBORATE JONES' UNIMPEACHED TESTIMONY*/

Jones testified that he participated in the robbery, and incriminated appellant as one of the participants. (Tr. 1011-1054) Jones' testimony that he participated in the robbery was not impeached.

Jones' fingerprint was found in the U-Haul truck used in the robbery. Over defense objection, the government was permitted to introduce expert testimony that the

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*/ (Tr. 594-618, 1011-1054; Supp. Tr. 218-220)

fingerprint was indeed Jones'. (Tr. 594-618) That evidence was used by the prosecutor to corroborate Jones' testimony relating to his part in the robbery. (Supp. Tr. 218-220) It was improper for the court to permit its introduction.

The general rule is that prior consistent statements of a witness may not be introduced in evidence to corroborate his testimony. Coltrane v. United States, 135 U.S. App. D.C. 295, 418 F.2d 1131, 1140 (1969); Johnson v. United States, 121 U.S. App. D.C. 19, 347 F.2d 803, 805-806 (1955). The same rule applies to corroboratory physical evidence. See Boeing Airplane Company v. O'Malley, 329 F.2d 585, 599 (8th Cir. 1964)

Here, while the defense attempted to impeach Jones' testimony about the participation of the individual defendants, there was no evidence introduced to challenge the fact that Jones himself was one of the robbers. Because the prosecuting attorney used the fingerprint evidence only for the purpose of bolstering Jones' testimony about participation (Supp. Tr. 218-220), evidence of his fingerprints was improperly placed before the jury.

## CONCLUSION

For the reasons stated:

(a) If the Court agrees with appellant's first point, but none of the others, his conviction for armed robbery should be dismissed and the case remanded to the trial court for re-examination of the sentence in the light of the fact that appellant stands convicted of a single felony.

(b) If the Court agrees with any one of the other points raised herein, the case should be reversed and remanded for a new trial.

Respectfully submitted,

Michael Mulroney

Counsel for Appellant
(Appointed by the Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been served on the office of the United States Attorney for the District of Columbia this _____ day of June , 1971.

/s/ Michael Mulroney
MICHAEL MULRONEY

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA :

Appellee : Appeal No. 24,772

vs. :

ROBERT L. JOHNSON :

Appellant :

# BRIEF FOR APPELLANT

Appeal from the United nStates District Court

for the District of Columbia

Cr. No. 525-70

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INDEX



CITATIONS: (Cases)



(Texts)



(Statutes)

## ISSUES PRESENTED FOR REVIEW

1. Whether appellant can be convicted of both the crime of mail robbery (Count I) and armed robbery (Count II) arising out of one and the same set of events.

2. Whether the Court properly precluded defense counsel from cross examining two chief prosecution witnesses on the question of whether one of them was a confederate of the defendants where it was apparent from a proffer made by counsel for appellant that there was an accomplice, and that the witness asserted to be a confederate was in contact with the defendants prior to the holdup.

3. Whether the Court erred in not barring evidence of weapons and ammunition found in the proximity of appellant at time of his arrest, where the prosecution failed to link that evidence with the holdup, or monies taken during the holdup, and the effect of such evidence was inflammatory and prejudicial.

4. Whether the Court erred in admitting testimony by appellant's wife regarding private conversations and actions with and by her husband, violating appellant's privilege against disclosure of confidential marital communications.

5. Whether the Court erred in permitting the prosecution to introduce physical evidence solely to buttress the unimpeached testimony of the witnesses Jones and Boone.

References to Rulings: None.

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This case has not previously been before the Court under any other name or title.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,773

UNITED STATES OF AMERICA, Appellee,

vs.

ROBERT L. JOHNSON, Appellant.

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Appeal from the United States District Court
for the District of Columbia

# BRIEF FOR THE APPELLANT

## --STATEMENT OF THE CASE --

### I. Jurisdiction and Procedings below.

On March 25, 1970, appellant was indicted on five counts: robbery of a person having charge of mail matter of the U.S. (18 U.S.C. S2114); kidnapping (22 D.C. Code 2101); armed robbery (22 D.C. Code S3202); robbery (22 D.C. Code S 2901) and assault with a dangerous weapon (22 D.C. Code S502). He pleaded not guilty to all counts at his arraignment, and was tried together with three co-defendants before a jury in the United States District Court for the District of Columbia. A fifth defendant, originally named in the indictment, was severed, and ultimately became a chief government witness.[1/] Judge John H. Pratt presided over the trial that began June 1, 1970 and ended June 15, 1970. At the close of the evidence, the Court dismissed the kidnapping charge (Transcript of Testimony p. 1824).[2/] The jury found appellant guilty on the mail robbery, armed robbery, assault with a dangerous weapon, and possession of a weapon. (R.44)

Appellant was found not guilty of that portion of the mail robbery statute that requires a finding that the life of the mail custodian was put in jeopardy by the use of a dangerous weapon. (R. 44).

On September 23, 1970, appellant was sentenced to concurrent sentences of 3 to 10 years on the mail robbery count, 10 to 30 years on the armed robbery count, and 3 to 10 years on the assault with a dangerous weapons counts. His appeal followed. (R.50.)

The jurisdiction of this Court derives from 28 U.S.C. S1291 and 1294.

II. Statement of Facts

On December 23, 1969, a mail truck was stopped by three persons, and a package containing $382,000 in currency was taken from its occupants, the truck driver and an armed guard, both U.S. Post Office employees. The truck had just pulled in the parking lot of the HOLC building, on a regular route from the Main Post Office to the U.S. Treasury Department, the ultimate destination of this package when the holdup took place. The thieves appeared to know that a large sum of money was on that particular truck. (Tr. 363-393) The postal employees were pushed into the back of the truck, and driven to a location several blocks away by one of the thieves, the other two remaining with them in the back compartment of the truck. The thieves left the truck, warning the postal employees to remain in the truck, then escaped in a U-Haul vehicle parked nearby. (Tr. 396).

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1/ Calvin Jones. Kirkland, Johnson, Knight and Bowman were tried together, Kirkland and appellant were convicted of the same four counts, Knight of two counts, and Bowman was acquitted. (R. 44) The convicted defendants each noted an

At trial, the government's chief witness, Calvin Jones testified that appellant was one of three persons, together with himself and co-defendant Kirkland, who carried out the theft of monies from the mail truck. He claimed that the holdup was planned at an establishment called the African Hut, an entertainment club located at 15th and 'U' Streets, run by co-defendants Knight and Kirkland, also characterized "a community gathering place". He said that he had seen the appellant there in the two months prior to the theft (Tr. 1015-1017.) Jones took no part in the planning, but was recruited by Kirkland to take the place of a would-be participant who had become unavailable to the endeavor. (Tr 1012-1043, 1079). Jones testified that in the early morning of December 23, 1969 he, appellant, and Kirkland went to the HOLC Building location, known to be the first stop on the route of a mail truck expected shortly to arrive. If the truck had two men on it, they understood it would c tain a sizable sum of money, as one man would be the armed escort. An earlier attempt at a holdup of the truck, on the prior morning, was abandoned because no armed guard was on the truck (Tr. 1021-1033).

When the mail truck stopped at the loading dock, Jones testified that he and appellant entered the rear of it, after pushing the driver in. The guard was then also pushed into the back of the truck. Appellant and Jones immediately asked which parcel contained "the money", and after it was pointed out to them, opened it and ascertained that it did. Kirkland drove the mail truck to a location several blocks away. During the ride, conversation took place between appellant and Jones and the two postal employees, some on a ribald note, a desultory attempt was made to tie the guard's feet, and one of the two

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2/ Transcript is referred to as "Tr. (page number)."

thieves relieved him of his gun. Jones testified that his own sawed-off shotgun was not loaded, and that appellant at no time openly displayed a weapon. Appellant's mask slipped down during the ride, enabling the two men to observe his features at close range.

The appellant's wife, Lynette Boone, testified that she was living at her mother's house at 1331 Vermont Ave., N.W., when in the morning of December 23, 1969, she heard appellant knocking on her bedroom window. She came out of the house, saw appellant and Kirkland, and appellant gave her a green plastic bag, telling her to hold it until called. Shortly thereafter, in response to appellant's phone call, she picked up appellant, Kirkland, and Jones, at a nearby location, by car, bringing the bag. She drove them to Kirkland's home, where according to her testimony, the contents of the bag were divided into five portions, appellant, Kirkland, and Jones each receiving one. (Tr. 1282-1287, 1302-1311). When she was later arrested in California, she had in her possession some of the funds derived from the holdup,(Tr. 1315.)

Appellant was arrested in Montreal, Canada on January 29, 1970 in the apartment of an acquaintance. A postal inspector testified that he accompanied five Canadian policemen who made the arrest, and that the appellant offered no resistence. At the time he had in his possession a .30 cal carbine and clip, with six boxes of shells, and a .38 cal revolver with two boxes of shells. Appellant was lying on a bed, listening to music. Appellant had used his own name in travelling, and had arrived by ordinary common carrier. (Tr. 724-725.)

Appellant did not take the stand to testify on his own behalf.

ARGUMENT

I.

APPELLANT WAS IMPROPERLY CHARGED AND CONVICTED OF MAIL ROBBERY AND ARMED ROBBERY FOR THE SAME ACT.

Appellant was charged, convicted, and sentenced for mail robbery and for armed robbery. (R. 41). There was only one offense committed, the robbery of the mail custodian, Rice, with the use of weapons. In Blockburger v U.S., 284 U.S. 299 (1932), the Supreme Court laid down the rule which determines whether the Congress intended an act or transaction to be punished as one crime or as two, where separate statutes proscribe the act or transaction. Generally that rule has been that if each statute requires proof of a fact that the other does not, the same act or transaction can be prosecuted under both statutes. But where Congress plainly intended that only one conviction should result, such legislative intent controls. This Court had recent occasion to analyze the legislative history of the mail robbery statute [3] while reviewing a simultaneous conviction thereunder and the D.C. robbery statutes, in United States v Spears (D.C. Cir. No. 23,043, decided February 16, 1971)[4]. Here the Court vacated a conviction of assault with intent to commit mail robbery,[3] concluding that Congress did not intend evidence of such assault to be an independent basis of conviction where the defendant is also convicted under the D.C. armed robbery statute[5] for the completed act. In the present case, appellant was charged with the completed act of mail robbery, and not merely the assault portion of the statute, as was Spears.

It would follow from Spears, and be also more consonant with Blockburger, that appellant cannot be convicted of armed robbery under the D.C. Code provisions, once he is convicted of a completed robbery under the mail robbery statute, for the same acts. The trial Court rejected this argument, but the trial took place before Spears was decided. (Tr. 1862-64)

Conviction on Count II of the indictment, armed robbery, must be set aside. Spears called for resentencing on the remaining Counts, to permit the trial court to take into account the fact that the appellant stands convicted of one less felony.

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3/ 18 U.S.C. S 2114 (1964) provides:
Whoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the U.S., with intent to rob, steal or purloin such matter ***
or robs any such person of mail matter, of of any money or other property of the U.S., shall for the first offense be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail matter ***
or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned for twenty five years.

4/ WLR Vol 99 p. 429; ____F 2d._____(1970)

5/ 22 D.C. S 3202 (Supp. III, 1970) provides:
If any person shall commit a crime of violence within the D.C. when armed or having readily available any pistol or other firearm *** he may in addition to the punishment provided for the crime be imprisoned for an indeterminate number of years up to life as determined by the Court***

Robbery is defined as a "crime of violence" by the DC Code, S 22-3201 (Supp. III, 1970).

II

THE TRIAL COURT IMPROPERLY PRECLUDED APPELLANT'S COUNSEL FROM CROSS-EXAMINING A CHIEF PROSECUTION WITNESS TO DEVELOP THE POSSIBILITY THAT HE WAS INVOLVED IN THE CRIME

A government witness, Rice, testified that he was the Post Office employee charged with custody of the package containing the monies stolen. (Tr. 530-539, 578). The Court ruled that Rice was the custodian of the stolen mail matter, (Tr 1448-9, 1887) within the meaning of the mail robbery statute. The record supports appellant's contention during trial that Rice played a part in planning the holdup. His own testimony recites that immediate suspicion attached to him (Tr. 134) and that his initial responses to questioning about his possible complicity were evasive and concealed information. (Tr. 133-4.) Early in his interrogation he made a tentative identification of appellant from a police photo exhibit (Tr. 150-1) but this photo[6] bears no useful similarity to appellant. (Tr. 573-5) He was given a lie detector test (Tr. 150-51) before he was assured that he was no longer a suspect (Tr 135.)

Both postal employees testified that the thieves appeared to know that a sizable amount of money was on the truck. Jones testified that the presence of the armed guard on the truck signified the transport of monies, and nevertheless came to the holdup with an unloaded weapon. (Tr. 1081) Jones testified that Kirkland had told him there was an "inside man" who set up the robbery (Tr 1080, 1087-8), but when defense counsel sought to enquire, the Court prevented him (Tr. 1081). In the long bench conference that followed, defense counsel set forth facts proposed to be adduced through the testimony of a witness, Collins, who had been extensively interviewed by Kirkland's and appellant's

counsel. The Court was apprised that Rice may well have been in contact with several of the defendants prior to the holdup, that he admitted coming to the African Hut, and that Rice had worked in the Post Office with Collins, allegedly one of the original planners of the holdup. (Tr 1084-89, 1754-56). A proffer of such evidence was made by counsel for the sole purpose of being allowed to cross examine the government's chief witnesses, Jones and Rice, on the question of Rice's complicity. Both lines of cross examination were cut off by the Court, no questions seeking to elicit from either witness any facts as to Rice's complicity being allowed by the Court (Tr. 566, 1085-6). Yet Jones testified that Kirkland had told him an inside man was setting up the robbery (Tr. 1080), that Collins knew about this, and then was not allowed to answer the question whether his unloaded gun was in any way related to the fact that one of the two postal employees was the inside man (Tr 1081). Rice testified that he had never talked to the defendants prior to the holdup (Tr 533) and yet was not permitted to be questioned even as to whether he had met the defendants at specific times and places prior to the crime (Tr 553-566).

Thus there was amply sufficient basis in the record to justify examining Jones and Rice on this point. The government virtually conceded in open Court (in absence of the jury) that evidence existed to show Rice had prior contact with the thieves. (Tr 207-208). Rice's denial thereof, and Jones's referance thereto should have been probed by cross examination and appellant's contention of Rice's complicity properly aired. Obviously, if Rice were an accomplice, there could be no theft from his person,

and Count I of the indictment, alleging such theft from a person as it must under the mail robbery statute, cannot stand. The Court seemed to recognize this (Tr 221). In view of Rice's stake in the case, and the prosecutorial stake in Rice as a victim, the defence counsel were simply precluded from full use of their main resource, sufficient latitude in cross examination. In Austin v U.S., 135 US App. D.C. 240, 418 F 2d 456, 459 (1969) this Court said:

> "Our devisions reflect great solicitude for an endeavor by the accused to establish bias on the part of the prosecution witness. They establish the propriety of showing either by cross examination or by extrinsic evidence, and indicate the broad range over which the inquiry may extend." (Citing Tucker v U.S., 135 US App. D.C., 417 F 2d 542, Wigmore, Evidence, 3rd ed. 949, 950.)

The appellant respectfully urges that the Court's rulings (Tr 565,6 and 1750) that extrinsic evidence of Rice's involvement should have been adduced before he could be cross examined thereon was error.

## III

## WHETHER THE COURT ERRED IN NOT EXCLUDING EVIDENCE OF WEAPONS AND AMMUNITION FOUND IN THE PROXIMITY OF APPELLANT AT TIME OF HIS ARREST, WHERE SUCH EVIDENCE WAS NOT LINKED TO THE HOLDUP, AND ITS EFFECT WOULD NECESSARILY BE INFLAMMATORY AND NOT PROBATIVE, AND THUS PREJUDICIAL TO APPELLANT

Over objection of appellant's counsel, the Court permitted the government to put into evidence as trial exhibits weapons and ammunition found in the room in which appellant was arrested on January 29, 1970 (Tr. 683). But the testimony of the postal inspector, McRae, regarding circumstance of the arrest, added

nothing of relevance to the government's case. He stated that appellant was lying on a bed with a .30 cal carbine and a clip near him, and that a .38 revolver with six shells, and some boxes of carbine and revolver shells were in a night table drawer nearby.[7] Appellant made no move to resist, and was listening to music at time the arresting officers entered (Tr 725). There was no showing that any weapon had been used or recently fired, nor that appellant had used other than his own name entering Canada, or that he arrived other than by commercial common carrier. (Tr. 724-5)

The evidence utterly fails to connect appellant's possession of weapons and ammunition, so garishly displayed to the jury at trial, with his role in the holdup. The government orally represented to the Court that the carbine and shell[8] had been bought in Maryland prior to appellant's departure for Canada with currency from the holdup, (Tr 683) but failed utterly to make such showing. These exhibits should not have been allowed into evidence, having played no part in the crime or its after events. As such it was pure res inter alias actos, simply a fact whose prejudicial impact on the jury far exceeded its discernable relevance. The same would apply to Exhibits 41 and 42, represented by the government to be linked to the holdup in Jones' testimony. Actually all witnesses coincided on that none saw appellant in possession of a visible weapon during the holdup. Introduction of these exhibits then can only serve to inflame the feelings of the jury against the appellant and not serve any probative function whatever.[9] Moreover, the government did not miss the opportunity created thereby to allude to the weapons

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7/ Government exhibits, 39, 40, 41, 42, and 43.
8/ Government exhibits 39, 40 and part of 43.
9/ Tr. 1457.

and ammunition exhibits in its closing address (Supplemental transcript p 227) and in its rebuttal address (Supplemental transcript p 318) without linking them to the events of the holdup in any logical way. This Court had occasion to note its disapproval of such tactics, as a naked appeal to the passions of the jury, in United States v Milton L Hayward, No. 22, 749, decided November 18, 1969[10/] stating,

> "It is fundamental to sound procedure in federal criminal prosecutions that counsel refrain from "appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only (be) to arouse passion and prejudice. Viereck v U.S., 318 US 236, 247 (1943)""

It is respectfully urged that admission into evidence of government exhibits 39 - 43 was erroneous and highly prejudicial to the appellant.

10/ ____App. D.C.____, _____F 2d_____(1969)

IV

WHETHER THE COURT ERRED IN ADMITTING TESTIMONY BY APPELLANT'S WIFE REGARDING PRIVATE CONVERSATIONS AND ACTIONS, WITH AND BY HER HUSBAND, VIOLATING THE APPELLANT'S PRIVILEGE AGAINST DISCLOSURE OF CONFIDENTIAL MARITAL COMMUNICATIONS

Appellant's wife testified that in the morning of December 23, 1969 she was asleep when she heard knocking on her bedroom window, saw that the appellant was outside. (Tr. 1275-83). She came outside, where he gave her a green plastic bag, asking her to keep it until called by phone. She claimed that Kirkland was nearby, but did not indicate that he took part in either the conversation or the tendering of the bag, or even observed any words or acts of her husband. She had no knowledge of a crime having been committed that morning. (Tr. 1322-32). She later responded to a call from the appellant, driving to pick up appellant, Kirkland, and Jones nearby and taking them to Kirkland's house, where the contents of the green bag, the fruits of the holdup, were divided. (Tr. 1283-5)

Appellant contended at trial that his actions and words to his wife outside her residence that morning were confidential communications, beyond a wife's testimonial competence. (Tr 1279-81). The government insisted that since Kirkland had come with appellant, the communications that took place were not confidential since a third person was present. Yet there was no evidence that Kirkland overheard, or participated in the conversation between appellant and Miss Boone, or took part in or observed appellant's acts, or in fact did anything more than "occupy some adjacent

Clearly appellant sought to take his wife into his confidence in going to her residence in the early morning, summoning her out, and entrusting herwith the green plastic bag. He approached her in a manner plainly predicated on their marital relationship. She had no knowledge at that time that there had been a theft from a mail truck that morning involving her husband, or that one had been planned previously. (Tr. 1355). Testimony by the wife regarding the episode, with its unequivocal elements of communication and confidentiality should not have been allowed into evidence, so clearly does it run counter the privilege of either spouse not to testify as to their private communications and knowledge gained pursuant to their marital trust.

The law recognizes that the privilege extends beyond communications to acts and actions observed by a spouse done in reliance on interspousal confidence. This Court had occasion to note this in United States v Frank Lewis, Appeals No. 22,641, decided May 21, 1970:

> "This is not to say that acts are never communicative; on the contrary, we recognize that there is considerable authority supporting the thesis that in particular contexts they can be. citing cases collected in Annot., 10 ALR 2d 1389 (1950); 8 J. Wigmore, Evidence S 2337, (McNaughton re. 1961)."

The admission into evidence of appellant's wife's testimony regarding their meeting in the morning of December 23, 1969 was plain error, and highly prejudicial to the appellant.

V

THE COURT ERRED IN PERMITTING INTRODUCTION OF EVIDENCE TO CORROBORATE THE UNIMPEACHED TESTIMONY OF WITNESSES JONES AND BOONE

Jones incriminated appellant as one of the participants in the holdup of the mail truck in which he himself participated. (Tr. 1011-1054) His testimony that he participated in the holdup was not impeached. His fingerprint was found in the U-Haul truck used as a get-away vehicle. Over defense objection, the government was permitted to introduce expert testimony that the fingerprint was indeed Jones' (Tr. 594-618). That evidence was alluded to by the prosecutor in his closing address to the jury to corroborate Jones' testimony relating to his part in the robbery (Supplemental transcript 218-220)

Jones and Miss Boone testified that they were arrested in Berkeley, California, in possession of some of the money missing in theft from the mail truck. Both admitted that they had brought such monies from Washington, D.C. They were not impeached with regard to these facts. Nevertheless, over defense objection, the government was permitted to introduce testimony of the arresting officer with regard to denominations of currency and other property in possession of these witnesses at time of their arrest.(Tr. 1371)

Neither line of testimony should have been permitted by the Court. Generally, evidence is not admissable to sustain the credibility of an unimpeached witness, and oral or written statements or acts of witnesses out of court which support his testimony adduced in court are inadmissable as self serving and hearsay. Boeing Airplane Company v. O'Malley, 329 F 2d

585, 599 (8th Cir. 1964) See also Conrad, Modern Trial Evidence, S 1155 and cases cited therein. This rule applies equally in a criminal case, see Gregory v U.S., 125 US App DC 140, 369 F 2d 185, (D.C. Cir. 1966), Coltrane v U.S., 135 US App D.C. 295, 418 F 2d 1131, Johnson v U.S., 121 US App D.C. 19, 347 F 2d 803, 805-6.

The use of corroborative evidence solely to buttress a witness' testimony about facts on which he has not been impeached, is improper. The evidence of Jones' fingerprints, and the arresting officer's testimony about monies in possession of Jones and Boone at time of their arrest was not properly allowed.

## CONCLUSION

For the reasons advanced, the conviction on Count II, armed robbery, should be dismissed, and the case remanded to the trial court for re-sentence in view of the fact that appellant stands convicted of one less felony, in accordance with Spears, supra. But the convictions on the other counts should be reversed for the other grounds given, and be remanded for a new trial.

Andrew P. Zimmer
Attorney for Appellant
Robert Lee Johnson
905 16th ST N.W.
Washington D.C. 20006

## CERTIFICATE OF SERVICE

That a copy of the foregoing Brief for Appellant, Robert Lee Johnson, was mailed prepaid first class this 13th day of August 1971 to Office of the U.S. Attorney, Appellate Section, U.S. District Court, Washington D.C. 20001.

Attorney for Appellant

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 24,772**

UNITED STATES OF AMERICA, *Appellee,*

v.

ARTHUR B. KNIGHT, *Appellant.*



**No. 24,773**



UNITED STATES OF AMERICA, *Appellee,*



v.

ROBERT L. JOHNSON, *Appellant.*

**No. 24,899**

UNITED STATES OF AMERICA, *Appellee,*

v.

HAYWOOD T. KIRKLAND, *Appellant.*

Appeals from the United States District Court
for the District of Columbia

HAROLD H. TITUS, JR.,
*United States Attorney.*
JOHN A. TERRY,
DAVID G. LARIMER,
*Assistant United States Attorneys.*

Cr. No. 525-70

# INDEX

## TABLE OF CASES

## OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

## ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the trial court erred in failing *sua sponte* to sever appellant Knight from his co-defendants when Knight made no request for a severance at trial, when he was charged with the same crime as his co-defendants, and when he failed to demonstrate any prejudice resulting from the joinder?

II. Whether appellants could be convicted and given concurrent sentences for both mail robbery, 18 U.S.C. § 2114, and armed robbery, 22 D.C. Code §§ 2901, 3202?

III. Whether the testimony of appellant Johnson's wife was barred by the marital privilege?

IV. (a) Whether the trial court erred in giving a variation of the standard *Allen* charge in its original charge to the jury?

(b) Whether the court prejudiced appellants by the juxtaposition of instructions?

(c) Whether the court incorrectly defined aiding and abetting?

V. Whether two guns and some ammunition found in appellant Johnson's possession when he was arrested one month after the robbery were properly admitted into evidence?

VI. Whether it can be said that the government used perjured testimony merely because a government witness was impeached to a degree by prior inconsistent statements?

VII. Whether the trial court properly admitted evidence (1) that the fingerprint of appellants' accomplice, Calvin Jones, who testified for the government, was found in the getaway truck, and (2) that when arrested, Jones had money from the robbery in his possession?

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* This case has not previously been before this Court.

VIII. Whether the trial court properly limited cross-examination of a government witness on the highly prejudicial and completely unsubstantiated claim that the witness was a collaborator in the robbery?

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,772

---

UNITED STATES OF AMERICA, *Appellee,*

v.

ARTHUR B. KNIGHT, *Appellant.*

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No. 24,773

---

UNITED STATES OF AMERICA, *Appellee,*

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ROBERT L. JOHNSON, *Appellant.*

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No. 24,899

---

UNITED STATES OF AMERICA, *Appellee,*

v.

HAYWOOD T. KIRKLAND, *Appellant.*

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Appeals from the United States District Court
for the District of Columbia

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## BRIEF FOR APPELLEE

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### COUNTERSTATEMENT OF THE CASE

A seven-count indictment was filed on March 25, 1970, charging appellants Arthur B. Knight, Haywood T. Kirkland and Robert L. Johnson, together with John H. Bow-

man and Calvin S. Jones, with robbery of mail matter and putting the life of the mail's custodian in jeopardy while effectuating the robbery, in violation of 18 U.S.C. § 2114, and with armed robbery, robbery, kidnapping and two counts of assault with a dangerous weapon, in violation of 22 D.C. Code §§ 2901, 3202, 2101 and 502, respectively. On June 3, 1970, after two days of pretrial proceedings, a jury trial commenced before the Honorable John H. Pratt.[1] On June 15 the jury found the three appellants guilty of robbery of mail matter and armed robbery. Appellants Kirkland and Johnson were found guilty, and appellant Knight not guilty, of two counts of assault with a dangerous weapon. The jury also determined that the mail custodian's life was not put in jeopardy and that defendant Bowman was not guilty of all charges. Appellants came on for sentencing on September 23, 1970. Appellant Knight was sentenced to three to ten years for mail robbery and four to twelve years for robbery while armed, to run concurrently. Appellants Kirkland and Johnson were sentenced to three to ten years for mail robbery, ten to thirty years for armed robbery, and three to ten years on both counts of assault with a dangerous weapon, the sentences all to run concurrently. These appeals followed.

## The Government's Case

On December 23, 1969, as dawn was breaking over Washington, D.C. three men robbed a United States mail truck and escaped with $382,000 in United States currency.

Mr. Andrew Arnold and Mr. David W. Rice, Jr., were the two postal employees on that truck when it was robbed. Mr. Arnold testified that his job was to drive a mail truck from the main Post Office to several government buildings in the downtown area (Tr. 379).[2] On the morning of December 23, Arnold had the early run which left the main Post

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[1] On May 25, 1970, the trial court had granted the government's motion to sever Calvin Jones from the other defendants.

[2] "Tr." signifies the trial transcript. "Tr. S." signifies the volume of the transcript containing the opening statement of the government and the closing arguments of all parties.

Office at 6:45 a.m. On account of the Christmas mail rush, a large U-Haul rental truck served as the mail truck (Tr. 379). Mr. Arnold was accompanied on this trip by an armed guard, Mr. Rice. That morning, in addition to the other mail matter normally loaded on the truck, Mr. Arnold loaded a sealed mail pouch which had been turned over to him by the guard, Mr. Rice.[3] As the truck pulled away from the Post Office toward its first stop a few blocks away at the HOLC Building, 101 Indiana Avenue, N.W., Mr. Arnold was driving, and Mr. Rice was in the cab on the right side (Tr. 378-380). When Arnold arrived at the HOLC Building, he backed his truck up to the loading dock next to a milk truck (Tr. 380). As Arnold opened the rear door of the truck, two men approached him from the rear and ordered him into the truck. Seeing one of the men armed with a sawed-off rifle, Mr. Arnold complied. The two men entered the truck with Arnold and closed the door behind them (Tr. 380). At the same time, as Mr. Rice was disembarking from the truck on the right, a man approached him with a gun, pushed him up against the side of the truck, frisked him and snarled, "This is it, mother fucker" (Tr. 534). Mr. Rice and his assailant remained on that side of the truck for a few minutes until the milk truck, which was parked on the other side, pulled away (Tr. 535). Rice was then taken to the rear of the truck and was asked the whereabouts of the driver. Suddenly a car pulled into the loading dock area. Rice's captor, who had been masked originally and was wearing a postal employee's uniform (Tr. 534-535), shed the mask and feigned working as Rice's partner (Tr. 536-537). During this time Rice "turned around and looked at" his assailant (Tr. 537). Rice was face to face with his unmasked assailant for about seven minutes before he was herded into the rear of the mail truck (Tr. 543).

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[3] This pouch contained $382,000 in United States currency and had been mailed from the United States Military Post Office in Frankfurt, Germany, to the United States Treasury, Washington, D.C. (Tr. 363). The pouch had been hand-delivered from Washington National Airport to Mr. Rice, who was to carry it to the Treasury Department (Tr. 558).

At trial Mr. Rice identified his armed assailant as appellant Kirkland (Tr. 541-543). He also testified that he had previously identified Kirkland at a lineup (Tr. 541-543). Likewise, Mr. Arnold, who had already been forced inside the truck, identified appellant Kirkland at trial as the robber who opened the rear door of the truck and shoved Rice inside.[4]

The two brigands who had originally approached Arnold remained in the rear of the truck with Rice and Arnold. One of them, the shorter of the two, wore a dark ski mask with only the eyes showing and was armed with a sawed-off rifle (Tr. 381, 546). Neither Rice nor Arnold could identify this man. However, both complainants identified the second man in the truck as appellant Johnson (Tr. 383, 550).[5] Johnson originally wore a mask similar to appellant Kirkland's, but it kept falling down during the proceedings and enabled both complainants to get "a pretty good look at him on two or three occasions" (Tr. 383). Rice recalled looking at Johnson unmasked, full in the face, for "a minute or a minute and a half" while Johnson attempted to tie him up (Tr. 549). In fact, at one point Johnson himself commented, "I think they saw my face" (Tr. 549).[6]

After Rice had been put in the back, the truck started moving. In about five minutes the truck stopped, and the two men in the back of the truck fled with the money, warning Rice and Arnold not to leave the truck themselves

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[4] Arnold testified that Kirkland wore no mask when he pushed Rice into the truck (Tr. 393). He also testified that he had previously identified Kirkland at a lineup (Tr. 400-401).

[5] Both Rice and Arnold testified that they had identified appellant Johnson at a lineup prior to trial (Tr. 406, 551-552). Additionally, Mr. Arnold testified that he had identified Johnson from photographs (Tr. 398).

[6] Before trial the court held a hearing on appellants' motion to suppress the in-court identifications made by Rice and Arnold (Tr. 47-165, 225-260). On the basis of that hearing, the court allowed both Rice and Arnold to make in-court identifications of appellants Kirkland and Johnson (Tr. 260). In addition, the government was permitted to introduce testimony that both Arnold and Rice had identified Kirkland and Johnson at lineups and that Arnold made a photographic identification of Johnson (Tr. 260-263). Appellants do not question these rulings on appeal.

for fifteen minutes (Tr. 396-397).[7] Arnold and Rice waited inside until they heard another vehicle pull away (Tr. 397, 550-551). Then Arnold, realizing that he was at North Capitol and DeFrees Streets, which was only a few blocks from the main Post Office, ran there to notify the postal authorities of the robbery (Tr. 397, 550-551).

On the day of the robbery William Stover was on duty as a parking lot attendant in a lot at North Capitol and DeFrees Streets (Tr. 1385-1386). He recalled that a U-Haul van was parked in his lot when he arrived for work. A short time later, a larger U-Haul van came up, and three men jumped from it and ran to the smaller U-Haul and sped away. Stover recalled that the smaller van's motor was running as it waited, although, because of its location on the lot, he could not determine whether anyone was in the truck (Tr. 1385-1388).

Calvin Jones, originally charged as a co-defendant, testified for the government and implicated John Bowman and the three appellants as his companions in crime. Jones testified that he had known these men since high school and that he began to see them more regularly during the fall of 1969 at an establishment called the African Hut at 15th and U Streets, N.W. (Tr. 1014-1017).

On Sunday, December 21, 1969, Calvin Jones was at the African Hut when he was approached by appellant Kirkland and told that Kirkland might need his help later. Jones was in and out of the club all evening. When he returned at about 2:00 a.m. on Monday, Kirkland made his earlier request more specific: he asked Jones to help him in a robbery (Tr. 1018). From 2:00 to 6:30 a.m. Jones, Bowman and the three appellants discussed the robbery which was to take place that morning (Tr. 1018-1022). Specifically, it was decided that appellant Knight would get a U-Haul truck for a get-away vehicle, Bowman would drive it, and Jones, Kirkland and Johnson would pull the

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[7] The robbers left behind some pieces of rope—later identified as having been cut from the same strand as other pieces of rope found on the loading dock at the HOLC Building (Tr. 1406-1407)—and parts of the paper in which the mail shipment had originally been wrapped (Tr. 363-364, 595-596).

robbery (Tr. 1020-1021). Later that morning appellant Knight returned with the U-Haul,[8] and at about 6:30 a.m. Jones, Bowman, Kirkland and Johnson departed. Appellant Kirkland, who was dressed in a postal employee's uniform,[9] informed the group that if a guard was on the truck they could be certain that money was aboard (Tr. 1022). That morning there was no armed guard on the mail truck, and so the robbery aborted.[10] Jones, Bowman and appellants Kirkland and Johnson all returned to the African Hut, where they were joined by appellant Knight (Tr. 1024-1025). The five of them split up and agreed to meet again at the African Hut at 4:00 o'clock the next morning, December 23, to plan the robbery again.

When the group reconvened as scheduled, it was agreed that Jones and appellants Kirkland and Johnson would wait near the loading dock at the HOLC Building for the mail truck while Bowman would wait with the U-Haul getaway truck at DeFrees Street (Tr. 1026-1027). Bowman was to stay at Defrees Street for thirty minutes, and if his companions had not arrived by then, he was to drive past the HOLC Building to see what had happened (Tr. 1033). As they left for their day's work, Kirkland was again dressed as a postal employee. Both Johnson and Kirkland had plastic masks and were armed with handguns (Tr. 1027-1029). Calvin Jones, the smallest of the group, carried a shotgun and wore a dark ski mask[11] (Tr. 1027-

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[8] The evidence showed that appellant Knight rented a U-Haul van truck from the Parkway Shell Station at New York Avenue and Bladensburg Road, N.E., at 3:30 a.m. on December 22, 1969 (Tr. 1456, 1816). The rental agreement signed by appellant Knight was found in the abandoned truck when it was recovered by the police around midnight on the day of the robbery (Tr. 460-462).

[9] There was testimony that appellant Kirkland was employed at the main Post Office from February to June 1969 as a distribution clerk (Tr. 1454).

[10] Mr. Arnold, the postal driver, corroborated this earlier attempt. He testified that on the day before the robbery he drove his route alone and, as he backed his truck up to the loading platform at the HOLC Building, he noticed a U-Haul truck similar to that used by the robbers the following day drive into the loading area and then drive quickly away (Tr. 407-408).

[11] This ski mask, which prevented both Mr. Arnold and Mr. Rice from identifying Calvin Jones, was recovered from the get away truck (Tr. 462)

1028). He also recalled that both he and Bowman took some miniature bottles of whiskey with them (Tr. 1033). Appellant Knight remained behind. He took his companions wallets, and it was suggested that if something went wrong, Knight was to call the police and report that the U-Haul, which he had rented, had been stolen (Tr. 1032).

Jones completely corroborated Arnold's and Rice's stories about the robbery itself. According to Jones, after the mail driver had backed his truck up to the loading dock, appellant Johnson and Jones approached him from the rear and forced him inside the rear of the truck. Kirkland covered the guard and eventually brought him back into the truck also (Tr. 1035). Jones testified that appellant Kirkland drove the mail truck away while he and Johnson remained in the rear of the truck with Arnold and Rice (Tr. 1036). Jones recalled that Johnson's mask had fallen from his face as he attempted to tie up Rice and Arnold (Tr. 1037). He also corroborated Arnold's and Rice's recollections of the conversation which took place inside the truck during the robbery (Tr. 384-396, 544-549, 1035-1039). After the bandits left the mail truck at North Capitol and DeFrees Streets, Bowman picked them up in appellant Knight's U-Haul (Tr. 1039). From there they went to 12th and O Streets, N.W., where the truck was abandoned, and then proceeded to the African Hut (Tr. 1041-1042). Lynette Boone, appellant Johnson's common-law wife, soon arrived at the African Hut and drove Johnson, Kirkland and Jones to Kirkland's house, where the money was counted and divided up on the kitchen table. Calvin Jones got $76,000 (Tr. 1043-1047).

Officer Robert Maxwell of the Metropolitan Police testified that at 11:45 p.m. on the day of the robbery he recovered what was believed to be a stolen U-Haul van at 12th and O Streets, N.W. In that truck he recovered a rental agreement signed by appellant Knight, a dark ski

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and was identified by Jones as the mask he wore during the robbery (Tr. 1028). It was also identified by Mr. Arnold as the mask worn by the "small-built" robber who originally approached him (Tr. 381-382).

mask, and several miniature whiskey bottles (Tr. 460-463). The government presented expert testimony that the fingerprints lifted from inside the right front door of that truck were those of Calvin Jones (Tr. 634-642) and that the prints on one of the whiskey bottles were those of John Bowman (Tr. 643-651).

Calvin Jones was arrested about a month after the robbery in Berkeley, California, sharing an apartment with Lynette Boone (Tr. 1050-1053, 1076-1077). At the time of his arrest he had in his possession several thousand dollars, some of which had been taken in the robbery (Tr. 1053-1054).[12]

Cross-examination of Jones was extensive (Tr. 1069-1237). In addition to freely admitting that he participated in the robbery, Jones admitted that when arrested he had a gun (Tr. 1073) and some cocaine (Tr. 1074-1076); that he had occasionally used cocaine since 1966 (Tr. 1076); that he had smoked marijuana on the evening before the robbery (Tr. 1109); that he had lived with Johnson's wife in California (Tr. 1119); and that he was at one time under a psychiatrist's care (Tr. 1113). In addition, several inconsistencies between his testimony at trial and both his testimony before the grand jury and a statement given to Postal Inspector Rutledge were developed on cross-examination (Tr. 1096-1109, 1130). Jones attempted to explain these inconsistencies in his testimony by emphasizing his general concern with attempting to "make a deal" with the authorities (Tr. 1106, 1131, 1134, 1139-1141, 1151-1152, 1173). He believed that testifying for the government was best because "the man caught me with the goods. I have no other alternative." (Tr. 1151).

Lynette Boone also testified for the Government after the trial court held a hearing to determine whether the marital privilege interposed a bar to her testifying (Tr. 1255-1257, 1278-1301). The court ruled that any conversation with her husband "in the presence of other people, is not a confidential communication and is something to

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[12] A list of the serial numbers of all the bills in the stolen shipment was prepared by the postal authorities after the robbery (Tr. 365-367, 375-376).

which she can give testimony'' (Tr. 1301). Miss Boone testified that at about 7:30 a.m. on the morning of the robbery, her husband (appellant Johnson) and appellant Kirkland came to her bedroom window and summoned her outside. There Johnson gave her a green plastic bag and told her to hold it until he called her (Tr. 1302-1303). She did not open the bag. A short time later Johnson called, and she drove up to the African Hut and picked up Johnson, Kirkland and Jones and returned them to Kirkland's apartment, where she watched as they divided the contents of the plastic bag (Tr. 1304-1305). She also observed two ''bundles'' of money being set aside for someone else (Tr. 1309). When arrested in California with Jones, she had some money in her attache case which had been taken in the robbery (Tr. 1310-1311, 1315).

Appellant Johnson was arrested in Montreal, Canada, on January 29, 1970. At the time of his arrest he had in his possession a rifle, some ammunition and a .38 caliber pistol, which was identified by Calvin Jones at trial as the same gun Johnson used in the robbery (Tr. 686-689, 1029-1030).

Detective Harry A. Noone of the Metropolitan Police arrested appellant Kirkland on January 16, 1970. When arrested, Kirkland had in his possession $5,000, all of which was taken in the robbery (Tr. 696, 736-738). On January 30, 1970, pursuant to a search warrant, the police searched Kirkland's house and recovered nine $100 bills which were also identified as part of the stolen postal shipment (Tr. 728-731). The government also introduced evidence that on the day after the robbery—December 24, 1969—appellant Knight's wife, Ernestine, paid in full a $273 deficiency on a loan at the Perpetual Building Association (Tr. 1407). Furthermore, on December 26 a cash payment of $220 was tendered to the National Bank of Washington to cover a four-month deficiency on a second-trust loan held by appellant Knight and his wife (Tr. 1455-1456).[13]

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[13] Mrs. Knight later testified that she made both payments out of her savings which she had accumulated for over a year (Tr. 1561-1563).

## The Defense Case

Neither appellant Johnson nor appellant Kirkland presented any evidence whatsoever.

Several witnesses testified on behalf of appellant Knight and co-defendant Bowman, both of whom also testified. Knight recalled opening the African Hut for business at about 7:00 p.m. on Sunday, December 21.[14] Johnson and Kirkland were present at the club, but Knight did not recall seeing either Bowman or Calvin Jones there (Tr. 1570-1571). Knight closed the Hut at 2:00 a.m. on December 22, and went directly to the Parkway Shell Station, where he rented a U-Haul truck (Tr. 1572-1573). Knight said that he rented the truck for several reasons: to pick up some furniture at a church in nearby Maryland, to deliver Christmas baskets on Christmas eve, and to remove some trash from behind his house (Tr. 1574-1576). Knight returned to the African Hut with the truck later in the morning of December 22. Kirkland and Bowman came to the club that morning but, according to Knight, Calvin Jones was never there (Tr. 1577-1579). Although the rental agreement signed by Knight showed that he had originally planned to return the truck by 3:30 a.m. on December 23 (Tr. 1816), no furniture or trash was moved that day (Tr. 1580).

Knight and a business companion, Mr. Benjamin Tyree, worked at the African Hut and at Mr. Tyree's house on business through the night of December 22 (Tr. 1588-1590).[15] The pair returned to the African Hut early on December 23 in Tyree's car. Knight denied seeing Kirkland, Johnson, Bowman or Jones on that morning—the day of the robbery (Tr. 1592). At around noon Knight and Tyree returned to Knight's house, where they discovered that the U-Haul truck was missing (Tr. 1593). They both

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[14] The African Hut was a club in the Dunbar Hotel run by the Community Sales and Service Corporation. Appellants Knight and Kirkland were officers of this corporation (Tr. 1473-1475, 1491, 1493).

[15] Mr. Tyree's wife testified that appellant Knight and her husband were in her home at 7:30 a.m. on the morning of the robbery, December 23 (Tr. 1557-1558).

checked the Parkway Shell Station to see if someone from the station had picked it up, and when they learned that the truck had not been picked up, they reported it stolen to the police (Tr. 1594-1595).[16]

Benjamin Tyree's testimony substantially mirrored that of appellant Knight. He recalled seeing Knight several times on December 21 and 22 at the African Hut (Tr. 1478-1481). On the latter evening Tyree accompanied Knight to Knight's house, where Knight parked the U-Haul truck. From there they went in Tyree's car to a liquor store, returned to the African Hut and stayed until 4:00 a.m., and then went to Mr. Tyree's house (Tr. 1482-1487). On the next morning, December 23, Tyree and Knight returned to the African Hut at about 10:30 a.m. and then proceeded to Knight's house, where they discovered the truck missing (Tr. 1487-1489). Tyree then accompanied appellant Knight to the Parkway Shell Station (Tr. 1489-1490). Tyree denied seeing Calvin Jones at the African Hut at all on December 22 or 23 (Tr. 1492). On cross-examination Mr. Tyree said that he had a clear recollection of his activities on December 21, 22 and 23, although not on some other days in December 1969, because he had tried carefully to reconstruct the events of those days, knowing that he would be a witness (Tr. 1502-1504). He recalled making notes about his activities, but, unaccountably, those notes were lost prior to trial (Tr. 1504).

Defendant Bowman denied being at the African Hut on Sunday evening and early Monday morning, December 21 and 22, because he had to get up early Monday to go to work as a construction laborer (Tr. 1661). He did go to the African Hut at about 11:30 a.m. on December 22 after he was unable to work on account of the weather (Tr.

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[16] Mr. Leon Hollingsworth, an employee at Parkway Shell, testified that on December 23 appellant Knight did report the U-Haul stolen betwen 10:00 and 10:30 a.m. and that he did call the police (Tr. 1551-1552). Officer Russell L. Drummon, Jr., of the Metropolitan Police, later responded to the Parkway Shell station and from there called appellant Knight to determine where he had last parked the allegedly stolen truck (Tr. 1803-1807).

1664-1665).[17] Bowman went to the African Hut that morning partly to help appellant Knight deliver some Christmas baskets. While waiting, he took a miniature whiskey bottle out to the U-Haul truck, consumed it there, and left the bottle behind in the truck (Tr. 1666-1667).

On the 23rd of December Bowman did not go to work either, but on that date, he claimed, he helped his brother clean their backyard (Tr. 1672-1674). Bowman admitted seeing Calvin Jones occasionally at the African Hut, but he denied ever speaking to him or socializing with him in any way (Tr. 1677-1678). Bowman did know appellants Knight, Kirkland and Johnson (Tr. 1674-1677).

## ARGUMENT

### I. The trial court did not err in failing *sua sponte* to sever appellant Knight from his co-defendants since he was properly joined under Rule 8, Fed. R. Crim. P., and since joinder resulted in no prejudice.

(Tr. 3-4, 18, 26-27, 460-462, 1014-1032, 1309, 1407, 1455-1456, 1487-1489, 1594-1595, 1607-1609, 1816, 1880-1881)

Although appellant Knight made no motion for severance before or during trial, he now seeks reversal of his conviction because the court erred in denying appellant Kirkland's and appellant Johnson's motion for severance (Tr. 3-4, 18, 26-27). Knight urges such a course on this Court in spite of the fact that neither Kirkland nor Johnson raises the denial of severance as error. Appellant Knight claims that severance was required because he was denied effective closing argument to the jury since he was barred from commenting on his willingness to testify, in contrast to appellant Kirkland's and appellant Johnson's refusal to testify. He also asserts that he was convicted merely by being associated with his co-defendants at trial.

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[17] Bowman's father, who worked with him, testified that both he and his son left for work a little after 6:00 a.m. on December 22 and then returned home shortly thereafter because of inclement weather (Tr. 1773-1774).

We submit that both his arguments deserve very little attention by this Court.

First of all, Knight's failure to request severance either before trial or during trial bars him now from making a claim of prejudicial joinder unless he was so seriously prejudiced that the court's failure to order severance was an abuse of discretion.[18] This silence by Knight's trial counsel [19] suggests to appellee that at trial he envisioned no prejudicial joinder whatsoever.[20] In any event, had Knight made a timely motion for severance based on the two grounds put forth here on appeal, the trial court would have been well within the parameters of its discretion in denying the motion.

Since appellants here were charged with the same crime, joinder of their cases was authorized by Rule 8(b), FED. R. CRIM. P. Although Rule 14, FED. R. CRIM. P., recognizes that severance may be appropriate where joinder tends to prejudice one or both of the co-defendants, the trial judge has been given wide latitude in determining whether severance is actually required.[21] His denial of a motion for severance may not be reversed on appeal absent a clear abuse of that discretion.[22] Moreover, in reviewing the exercise of that discretion the courts have struck a balance in favor of joint trials.[23]

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[18] *United States* v. *Daniels*, 141 U.S. D.C. 223, 228, 437 F. 2d 656, 661 (1970); *Cupo* v. *United States*, 123 U.S. App. D.C. 324, 327-328, 359 F.2d 990, 993-994 (1966), and cases cited therein.

[19] Appellant Knight is, of course, represented by different counsel on appeal.

[20] *See United States* v. *Wilson*, 140 U.S. App. D.C. 220, 226, 434 F.2d 494, 500 (1970).

[21] *E.g.*, *United States* v. *Robinson*, 139 U.S. App. D.C. 286, 289, 432 F.2d 1348, 1351 (1970).

[22] *Opper* v. *United States*, 348 U.S. 84, 94-95 (1954); *United States* v. *Wilson*, *supra* note 20; *Brown* v. *United States*, 126 U.S. App. D.C. 134, 139, 375 F.2d 310, 315 (1966).

[23] *United States* v. *Hines*, D.C. Cir. No. 23,281, decided November 1, 1971, slip op. at 31. In *Hines* this Court quoted with approval the following language from *Parker* v. *United States*, 404 F.2d 1193, 1196 (9th Cir. 1968):

> [Joinder] expedites the administration of justice, reduces the congestion of the trial dockets, conserves judicial time, lessens the burden upon citi-

Appellant Knight's claim that he was somehow prevented from effectively arguing his case to the jury because he could not comment on his co-defendants' failure to testify is without merit. The trial court, quite correctly, denied Knight's request to comment unfavorably on his co-defendants' failure to testify (Tr. 18).[24] Of course, had there been separate trials as Knight now claims there should have been, this line of argument would have been unavailable to Knight in any event because of the absence of the co-defendants.[25] The remedy Knight now seeks would have given him no more advantage in the presentation of his case than he actually had.[26]

Likewise, Knight's claim that he was found guilty merely because of his "association" with his co-defendants is frivolous. Of course, in every joint trial there is a risk that adverse evidence against one defendant will improperly rub off on the other defendants,[27] but absent an ex-

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zens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once.

[24] *United States* v. *Hines*, *supra* note 23, slip op. at 31-33; *Coleman* v. *United States*, 137 U.S. App. D.C. 48, 57, 420 F.2d 616, 625 (1969); *cf. DeLuna* v. *United States*, 308 F.2d 140 (5th Cir. 1962).

[25] *See United States* v. *Krechinsky*, 291 F. Supp. 290, 292-293 (D. Conn. 1967).

[26] It would seem that appellants Kirkland and Johnson, who chose not to testify, might have a more colorable claim of prejudice from being joined with two defendants who did testify. However, even if this were raised on appeal, it is clear that there was no prejudicial joinder here. Counsel for appellant Knight and defendant Bowman were prohibited from commenting adversely on their co-defendants' failure to testify, and they abided by that ruling. In addition, there was not such an exaggerated emphasis on Knight's or Bowman's taking the stand as to point up incidentally Kirkland's and Johnson's disinclination to testify. *See United States* v. *Hines*, *supra* note 23, slip op. at 31-33. The statements of Bowman's counsel (Tr. S. 274) "were not of such character that the jury would naturally infer them to have been directed against [Kirkland and Johnson's] silence." *United States* v. *Barney*, 371 F.2d 166, 171 (7th Cir. 1966). Furthermore, it is clear that even had their silence been pointed out merely "incidentally," there would have been no violation of their constitutional rights. *United States* v. *Hines*, *supra note* 23, slip op. at 33; *United States* v. *Barney*, *supra*, and cases cited therein.

[27] *Blumenthal* v. *United States*, 332 U.S. 539, 550-560 (1947).

traordinary situation—which this case does not present—cautionary instructions adequately safeguard each defendant.[28] Here the court instructed the jury that they were to consider each defendant separately, and each count in the indictment separately as to each defendant.[29] That the members of the jury were alert to this admonition is evidenced by their acquittal of defendant Bowman, against whom there was not an insignificant amount of evidence.[30]

The fact that there exists a greater quantum of evidence against one of several co-defendants does not automatically mandate severance.[31] In this case there was, of course, evidence introduced which did not directly apply to appellant Knight; but on the other hand, some of the evidence against Knight did not directly implicate his co-defendants. Moreover, Knight's claim that "relatively little" of the evidence introduced at trial implicated him (Appellant Knight's Brief at 17) is simply a gross misstatement of the record. Knight was identified by Calvin Jones as one of the primary conspirators who was present in the early

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[28] *United States* v. *Hines, supra* note 23, slip op. at 32; *Barnes* v. *United States*, 127 U.S. App. D.C. 95, 96, 381 F.2d 263, 264 (1967).

[29] The court instructed the jury:

> In this case there are multiple defendants, four of them; and multiple counts, five of them. Each of the four defendants is charged in five counts. Because of this fact, I should tell you that you should give separate consideration and render separate verdicts with respect to each defendant as to each count. And in order to assist you to do this, why we have prepared a special verdict form covering each defendant as to each count. You will get that when you retire to deliberate on this case.
>
> Each defendant is entitled to have his guilt or innocence as to each of the crimes charged determined from his own conduct and from the evidence which applies to him, as if he were being tried alone. The guilt or innocence of any one of the defendants of any of the crimes charged should not control or influence your verdicts respecting the other defendants.
>
> You may find any one or more of the defendants guilty or not guilty. At any time during your deliberations may return your verdict of guilty or not guilty with respect to any defendant on any count. (Tr. 1880-1881.)

[30] *United States* v. *Hines, supra* note 23, slip op. at 32; *Barnes* v. *United States, supra* note 28.

[31] *Cf. United States* v. *Hines, supra* note 23, slip op. at 31-32.

hours of both December 22 and 23 as the heist was planned (Tr. 1018-1032). The U-Haul truck which was proven to be the getaway vehicle was rented by Knight the day before the robbery (Tr. 460-462, 1456, 1816). Jones further testified that Knight was to report the truck stolen if anything went awry (Tr. 1032), and that is precisely what Knight did (Tr. 1487-1489, 1594-1595). Knight, Kirkland, Johnson and Bowman were all friends (Tr. 1014-1017, 1607-1609). Furthermore, within days of the robbery, Knight and his wife paid $500 to satisfy two deficient loan accounts (Tr. 1407, 1455-1456). When the proceeds of the robbery were doled out, Lynette Boone recalled that two piles of money were set aside for someone else (Tr. 1309). Certainly a reasonable inference from her testimony is that these piles of money were for the other two conspirators named by Calvin Jones—Knight and Bowman—who were absent when the loot was divided.

Since there was no motion for severance by appellant Knight, and since he has failed to establish any prejudice whatsoever from his joint trial—except for the fact that he was convicted—the trial court clearly did not err in failing to order a severance *sua sponte*.

## II. Appellants were properly convicted of both mail robbery and armed robbery.

Appellants Knight and Johnson contend that they could not be convicted and sentenced concurrently both for robbery under the federal mail robbery statute, 18 U.S.C. § 2114, and for armed robbery under the District of Columbia statutes, 22 D.C. Code §§ 2901 and 3202. Appellants were convicted of postal robbery [32] and of robbery

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[32] The count charging postal robbery (count one of the indictment) reads:

On or about December 23, 1969, within the District of Columbia, the defendants Arthur B. Knight, Haywood T. Kirkland, Robert L. Johnson, Calvin S. Jones and John H. Bowman, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of David W. Rice, mail matter and money which was the property of the United States, in the lawful charge, control and custody of David W. Rice, consisting of about $382,000 in money and in effecting such robbery, the defendants Arthur B. Knight,

while armed with a dangerous weapon.[33] The court sentenced appellant Knight to three to ten years on the postal robbery and four to twelve years for armed robbery, the sentences to run concurrently. Appellant Johnson was sentenced to three to ten years on the mail robbery count and ten to thirty years on the armed robbery count. Appellants now claim, for the first time, that convictions under both statutes cannot stand in light of *United States* v. *Spears*, —— U.S. App. D.C. ——, 449 F.2d 946 (1971), even though only concurrent sentences were imposed. Both appellants claim, rather arbitrarily we submit, that the armed robbery conviction must be vacated.

We strongly maintain, however, that appellants reliance on *Spears* is completely misplaced and that the convictions and concurrent sentences on both counts were entirely proper.

In robbing David W. Rice of the $382,000 appellants violated both the federal mail robbery statute and the District of Columbia robbery statute.[34] Traditionally, when separate statutes are applicable to a single criminal transaction, the court must determine if the criminal conduct

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Haywood T. Kirkland, Robert L. Johnson, Calvin S. Jones and John H. Bowman put the life of David W. Rice in jeopardy by the use of dangerous weapons, that is, a pistol and a sawed-off shotgun.

[33] The count charging armed robbery under the District of Columbia statute (count two of the indictment) reads:

> On or about December 23, 1969, within the District of Columbia, the defendants Arthur B. Knight, Haywood T. Kirkland, Robert L. Johnson, Calvin S. Jones and John H. Bowman, while armed with dangerous weapons, that is a pistol and a sawed-off shotgun, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of David W. Rice, property of the United States, in the care, custody and control of David W. Rice, consisting of about $382,000 in money. This is the same money which is mentioned in the First Count of this indictment.

[34] Of course, had this robbery happened anywhere but in the District of Columbia, appellants could have been tried by the state for robbery under a state statute and by the United States under the federal mail robbery statute. A finding of guilt or innocence in the first prosecution would not have barred a later prosecution by the other sovereign. *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Hill* v. *Beto*, 390 F.2d 640 (5th Cir.), *cert. denied*, 393 U.S. 1007 (1968).

is to be punished as one act or two. The court must first ascertain if Congress intended separate convictions and separate sentences for the criminal act. If it is unclear whether Congress intended one criminal act to be prosecuted under two separate statutes, the courts generally rely on the test established in *Blockburger* v. *United States,* 284 U.S. 299 (1932), in which the Supreme Court sanctioned convictions and consecutive sentences for violations of 26 U.S.C. §§ 4704 and 4705 which arose out of a single sale of morphine. The court held in *Blockburger:*

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact which the other does not.*[35]

Once it is established that two convictions for a single act are permissible, the court must then determine if consecutive sentences are proper. Again the rule is that the intent of Congress controls. Absent a congressional intent to pyramid penalties, the so-called "rule of lenity" mandates concurrent sentences.[36]

In urging this Court to vacate one of the robbery convictions, appellants rely almost exclusively on *United States* v. *Spears, supra.* But clearly the issue before the Court here is not the issue which was decided by this Court in *Spears.* The issue in *Spears* was whether one could be convicted both of assault with intent to commit robbery and with the completed robbery. After an exhaustive review of the legislative history of the mail robbery statute, the Court concluded that the assault proscribed by 18 U.S.C.

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[35] *Blockburger* v. *United States, supra,* 284 U.S. at 304 (emphasis added).

[36] *Irby* v. *United States,* 129 U.S. App. D.C. 17, 390 F.2d 432 (1967) (*en banc*). It is absolutely clear, however, that the "rule of lenity" is nothing more than a rule of statutory construction and is to be invoked only when the applicable statute is ambiguous on the issue of congressional intent. The rule "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States,* 364 U.S. 587, 596 (1961).

§ 2114 was "an integral part" of an unsuccessful attempt to rob a mail carrier.[37] The Court did not base its decision on the *Blockburger* test at all, since it gleaned from the legislative history evidence that

> Congress did not intend that any of the elements of the attempt, singly or in the aggregate, should form the basis for an independent conviction.[38]

A similar congressional intent has been found as to the federal bank robbery statute, 18 U.S.C. § 2113. Both the Supreme Court[39] and this Court[40] have determined that Congress did not intend an accused to be convicted of "entry" into a bank with intent to rob when he is also convicted of the consummated robbery.

We believe that the underlying rationale for both *Spears* and the *Prince* line of cases is rooted in the doctrine of lesser included offenses. In *Prince* the Court specifically relied on this doctrine and found that "it was manifestly the purpose of Congress to establish lesser offenses" rather than to establish two "completely independent offense[s]."[41] The "entry" merged into the completed robbery and, absent a congressional directive to the contrary, convictions for both were impermissible.[42] It is equally clear that the *Spears* decision was based on the merger of lesser included offenses into the most serious offense—the completed robbery. This Court in *Spears*

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[37] *United States* v. *Spears*, *supra*, —— U.S. App. D.C. at ——, 449 F.2d at 954.

[38] Id.

[39] *Prince* v. *United States*, 352 U.S. 322 (1957); *see also Heflin* v. *United States*, 358 U.S. 415 (1959).

[40] *Bryant* v. *United States*, 135 U.S. App. D.C. 138, 417 F.2d 555 (1969); *see also United States* v. *Parker*, 143 U.S. App. D.C. 57, 442 F.2d 779 (1971); *Marshall* v. *United States*, 141 U.S. App. D.C. 1, 436 F.2d 155 (1970); *Coleman* v. *United States*, *supra* note 24.

[41] *Prince* v. *United States*, *supra* note 39, 352 U.S. at 327.

[42] The defendant in *Prince* was given consecutive sentences. Although the Court talked about whether Congress intended pyramiding of penalties, it is clear that the Court was really concerned with the threshold question of whether there could be *two convictions*.

found that the elements of an attempted robbery were not meant by Congress to form the basis for a separate conviction when the robbery is consummated. When a greater and lesser offense are charged, the jury considers the lesser offense only if they have a reasonable doubt as to guilt on the greater charge.

> The reason for this absence of consideration is not any inconsistency between the offenses. It rather reflects the very "inclusion" that defines the lesser offense as one "included" in the greater. A lesser included offense is one which is necessarily established by proof of the greater offense, and which is properly submitted to the jury, should the prosecution's proof fail to establish guilt of the greater offense charged . . .[43]

Clearly the issue before the Court in the instant case does not revolve around the doctrine of lesser included offenses. It cannot be contended that the District of Columbia armed robbery statute defines a *lesser included* offense of the federal mail robbery statute.[44] The issue is whether appellants can be convicted for the completed robbery under two separate robbery statutes, 18 U.S.C. § 2114 which prohibits postal robberies wherever they occur, and 22 D.C. Code § 2901, which prohibits all robberies in the District of Columbia. Appellants were not convicted of both an attempt and a completed robbery. Rather, they were convicted of violating two separate criminal provisions. Under the *Blockburger* test these convictions must not be disturbed.

Postal robbery under 18 U.S.C. § 2114 requires "proof of a fact" which the District of Columbia robbery statute

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[43] *Fuller* v. *United States*, 132 U.S. App. D.C. 264, 292-293 407 F.2d 1199, 1227-1228 (1968) (*en banc*), *cert. denied*, 393 U.S. 1120 (1969); *see United States* v. *Butler*, D.C. Cir. No. 24,050, decided November 17, 1971.

[44] Appellant Knight's claim that *Spears* "suggests" that the offense defined in the District of Columbia robbery statute is included within the offense under the Federal statute is clearly without foundation. *Spears* says nothing of the sort.

does not, namely, that the robbery was of a person in custody of mail matter or of any money or other property of the United States. And, not insignificantly, if the robbery is proven and if the life of the mail custodian is put in jeopardy by the use of a dangerous weapon, the accused *must* be imprisoned for twenty-five years. On the other hand, to convict under the District of Columbia armed robbery statute there must be proof that the accused was armed with, or had readily available, a dangerous weapon. Proof necessary to convict of postal robbery does not necessarily include evidence that the robber was armed. Therefore, since there are different elements necessary to prove both offenses, both convictions were proper.

This Court has followed *Blockburger* in other instances and held multiple convictions permissible. For example, in *Evans* v. *United States*[45] this Court affirmed separate convictions and concurrent sentences for grand larceny of an automobile and unauthorized use of the same automobile, both of which arose from a single criminal act. In *Young* v. *United States*[46] the Court upheld separate convictions and concurrent sentences for assault with intent to rob and assault with a dangerous weapon. In *Smith* v. *United States*[47] and *Ingram* v. *United States*[48] this Court approved multiple convictions for assault with intent to kill and assault with a dangerous weapon as long as only concurrent sentences were imposed, and in *Davenport* v. *United States*[49] the Court reached a comparable result with respect to multiple convictions for manslaughter and assault with a dangerous weapon.[50]

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[45] 98 U.S. App. D.C. 122, 232 F.2d 379 (1956).

[46] 109 U.S. App. D..C. 414, 288 F.2d 398 (1961).

[47] 135 U.S. App. D.C. 284, 418 F.2d 1120 (1969).

[48] 122 U.S. App. D.C. 334, 353 F.2d 872 (1965).

[49] 122 U.S. App. D.C. 344, 353 F.2d 882 (1965).

[50] In *United States* v. *Rollerson*, —— U.S. App. D.C. ——, 449 F.2d 1000 (1971), this Court determined that a summary contempt proceeding for an act committed in the presence of the court did not bar, on double jeopardy grounds, a later prosecution under 18 U.S.C. § 111 and 22 D.C. Code § 502 for the same act. During his trial for robbery Rollerson threw a water pitcher at the Assistant United States Attorney who was prosecuting the case. After being

Although this Court has not specifically ruled on the question of whether one can be convicted under both the federal mail robbery statute and the local robbery statute,[51] in at least three cases this Court, when vacating a conviction for "entry" with intent to rob a bank under the *Prince* and *Bryant* rule, has not questioned the propriety of concurrent sentences for *both* bank robbery under the federal statute and robbery under the local statute.[52] The propriety of two convictions is entirely reasonable because two separate and distinct societal interests are at stake. 18 U.S.C. § 2114 attempts to safeguard the United States mail and those who deliver it. Congress has emphasized its concern for unencumbered mail delivery by providing a minimum twenty-five year penalty for a violation of section 2114 when the life of the custodian is placed in jeopardy.[53] This Court has previously held that where two different societal interests are involved, both multiple convictions and consecutive sentences are proper unless there is genuine uncertainty as to congressional intent.[54] This Court is not faced here with the question of whether con-

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found in contempt, Rollerson was later convicted and sentenced concurrently for assault with a dangerous weapon 22 D.C. Code § 502, and for assulting a federal officer under 18 U.S.C. § 111. Although Rollerson never appealed the assault charges, this Court when considering his double jeopardy claim never questioned the propriety of the two separate convictions under 22 D.C. Code § 502 and 18 U.S.C. § 111 which arose out of one assaultive act. *United States* v. *Rollerson, supra; Rollerson* v. *United States*, 132 U.S. App. D.C. 10, 405 F.2d 1078 (1968).

[51] *See United States* v. *Hooper*, 139 U.S. App. D.C. 171, 432 F.2d 604 (1970). In *Marshall* v. *United States, supra* note 40, this Court merely mentioned the issue and remarked that it was being considered by the Court in *Spears*. However, *Spears* specifically stated that it was "not required to decided whether *both* the robbery provisions of 18 U.S.C. § 2114 and D.C. Code § 22-2901 are applicable." *United States* v. *Spears, supra*. —— U.S. App. D.C. at —— n.12, 449 F.2d at 949 n.12.

[52] *United States* v. *Parker, supra* note 40; *Marshall* v. *United States, supra* note 40; *Coleman* v. *United States, supra* note 24.

[53] This Court has commented forcefully on the advisibility of combining all possible charges into one prosecution so as to avoid double jeopardy problems and conserve badly needed judicial energies. *See Fuller* v. *United States, supra* note 43, 132 U.S. App. D.C. at 289-290, 407 F.2d at 1224-1225.

[54] *E.g., Irby* v. *United States, supra* note 36.

secutive sentences are proper [55] since the court's sentences were imposed concurrently.

We therefore maintain that, the two convictions being quite proper, the concurrent sentences for both were reasonable and well supported by the decisions of the Supreme Court and this Court.[56]

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[55] Perhaps prior to enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358 (July 29, 1970), the rule of lenity would have barred consecutive sentences for the two robbery convictions here. But the rule of lenity is based on the premise that no clear congressional intent concerning pyramiding of penalties was evident; see footnote 36, *supra*. Now, however, there is very clear evidence of congressional intent relative to sentencing. 23 D.C. Code § 112 (Supp. IV, 1971) provides:

> A sentence imposed on a person for conviction of an offense *shall*, unless the court imposing such sentence *expressly* provides otherwise, run *consecutively* to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not. [Emphasis added.]

Arguably, had this case been tried on or after February 1, 1971, consecutive sentences would be permissible. At the very least, it is clear that Congress intended the separate crimes to be considered separately and not be automatically merged because they were part of the same transaction.

This newly enunciated congressional policy ought carry great weight with this Court. *See United States* v. *Dorsey*, —— U.S. App. D.C. ———, ———, 449 F.2d 1104, 1107 (1971); *United States* v. *Simpson*, 144 U.S. App. D.C. 259, 445 F.2d 735 (1970). While this Court need not now determine if consecutive sentences would be proper, this strong declaration of policy at the very least shows that Congress intends separate sentences to flow from separate convictions.

[56] Appellants' claim that the armed robbery conviction must be vacated rather than the mail robbery count, though understandable in light of the considerably higher penalty imposed for the former, is based on neither good law nor good sense. Appellants proffer no reason for rejecting the armed robbery conviction rather than that for mail robbery. We of course maintain that both convictions and sentences were eminently reasonable, but even if we agreed with appellants' argument, it would make little sense to claim that the *greater* offense—penaltywise—merges into the *lesser* offense.

## III. The testimony of appellant Johnson's wife was not barred by the marital privilege since the questioned conversation took place in the presence of a third party and therefore was not confidential.

(Tr. 1252-1274, 1281-1391)

Appellant Johnson claims that the trial court erroneously allowed his former common-law wife, Lynette Boone, to testify over his objection about certain events which occurred on the day of the robbery. He claims that this testimony was barred by the marital privilege.

Miss Boone testified, out of the presence of the jury,[57] that at about 7:30 a.m. on the day of the robbery she was awakened by a knocking on her bedroom window (Tr. 1282, 1288). She went to the window, and appellant Johnson, who was accompanied by appellant Kirkland, told her to come outside. Johnson gave Miss Boone a green plastic bag and told her to hold it until he telephoned her later (Tr. 1283). Kirkland was only *one and a half feet* away from Johnson and Miss Boone when this conversation occurred (Tr. 1291-1292). About ten minutes later Johnson called and told Miss Boone to drive up to 15th and U Streets and pick him up. There she picked up not only Johnson but also Kirkland and Calvin Jones and transported them all to Kirkland's house, where the contents of the bag were divided (Tr. 1283-1285). She admitted being arrested in Berkeley, California, with some money given to her by appellant Johnson (Tr. 1287-1288). After hearing her testimony, the court ruled that the events which occurred outside her bedroom window on the morning of the robbery were not covered by the marital privilege (Tr. 1300-1301). However, the court did preclude proof of the contents of the subsequent phone call as well as testimony that Johnson gave Miss Boone the money

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[57] The court received Miss Boone's testimony out of the presence of the jury (Tr. 1281-1294) and heard extensive argument from counsel (Tr. 1252-1274, 1294-1300) before ruling on the admissibility of her testimony.

which she had in her possession when arrested in California (Tr. 1301).

The trial court's ruling allowing Miss Boone to testify about the early morning meeting with her husband was correct beyond peradventure. Congress has provided in 14 D.C. Code § 306 that a wife is competent but not compellable [58] to testify against her husband except for "confidential communications made by one to the other during marriage." [59] To validate a claim of the marital privilege, appellant Johnson had to show that the testimony concerned "communications" which were "confidential." [60] Appellant has failed completely here—as he did at trial—to show that the events occurring during the early morning rendezvous outside Miss Boone's window were in any sense confidential. The law is very clear (and logic seems to compel) that the presence of a third party, in this instance Kirkland, during a communication between husband and wife completely negates any such claim.[61] Miss Boone's testimony was properly admitted.

## IV. There were no errors in the instructions.

(Tr. 1847-1848, 1867-1868, 1877, 1901-1902, 1913-1914, 1917-1918)

Appellants claim that there were several errors in the instructions which require reversal. Appellant Kirkland

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[58] The court properly cautioned Miss Boone, prior to her testifying, that she could not be forced to testify against her husband (Tr. 1256). *See Postom* v. *United States*, 116 U.S. App. D.C. 219, 220, 322 F.2d 432, 433 (1963), *cert. denied*, 376 U.S. 917 (1964).

[59] *United States* v. *Lewis*, 140 U.S. App. D.C. 40, 43, 433 F.2d 1146, 1149 (1970).

[60] *Id.* at 43-44, 433 F.2d at 1149-1150.

[61] *Pereira* v. *United States*, 347 U.S. 1, 6 (1954); *Wolfe* v. *United States*, 291 U.S. 7, 14-17 (1934); *Dobbins* v. *United States*, 81 U.S. App. D.C. 218, 221, 157 F.2d 257, 260, *cert. denied*, 329 U.S. 734 (1946); *Grulkey* v. *United States*, 394 F.2d 244, 246 (8th Cir. 1968); *Pool* v. *United States*, 260 F.2d 57, 64 (9th Cir. 1958); *Picciurro* v. *United States*, 250 F.2d 585, 589 (8th Cir. 1958); *Tabbah* v. *United States*, 217 F.2d 528, 530 (5th Cir. 1954); *United States* v. *Mitchell*, 137 F.2d 1006, 1009 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944); 8 J. WIGMORE, EVIDENCE § 2336 (McNaughton ed. 1961); C. MCCORMICK, EVIDENCE § 84 (1954).

objects both to the giving of the *Allen* charge in general and to the particular phraseology used by the court in its charge. Appellant Knight claims that the court's aiding and abetting instruction was defective and also that there was "prejudicial juxtaposition" of the instruction on accomplice testimony and the instruction on the testimony of a defendant. A review of both the record and the applicable law shows clearly that all these claims are without substance.

### A. *The giving of a variation of the standard* Allen *charge—given before this Court suggested a change in that charge—was proper, and the specific language used by the court was without error.*

Plainly, appellant Kirkland's objections to the *Allen* charge are without merit. The court gave a variation of the standard *Allen* charge[62] before the jury retired to consider its verdict. Kirkland contends, if we correctly understand his argument, that the court's omission of two sentences which are contained in the standard *Allen* charge coerced the jury into rendering a guilty verdict.[63] He

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[62] *Allen* v. *United States*, 164 U.S. 492 (1896); *see* JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 41 (1966). The exact charge given by the court was as follows:

> Now, ladies and gentlemen, your verdict must be the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree on the verdict. Your verdict must be unanimous. Although this verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusions of your fellows, you should examine the questions submitted with candor and with proper regard and deference to the opinions of each other. You should listen to each other's arguments with a disposition to be convinced. If much the larger number of jurors are for conviction, a dissenting juror should consider carefully whether his doubt is a reasonable one when it makes no impression upon the minds of so many jurors equally intelligent with him—or herself. If, upon the other hand, the majority are for acquittal, the minority ought to ask themselves and carefully consider whether they may not reasonably doubt the correctness of their judgment, which is not concurred in by the majority. (Tr. 1917-1918.)

[63] At trial counsel objected to the giving of the "*Allen* charge" (Tr. 1847-1848). There was also brief reference to the absence of the sentence "It is

objects to the *absence* of these sentences: (1) "In a large proportion of cases absolute certainty cannot be expected"; and (2) "It is your duty to decide the case if you can conscientiously do so."

When this charge was given—June 12, 1970—there existed overwhelming authority that the standard *Allen* charge was proper and did not coerce the jury.[64] It was after appellants' trial that this Court first intimated in *United States* v. *Johnson*[65] and then held, in *United States* v. *Thomas, supra* note 64, that references to the deference owed by the minority of jurors to the majority should be abandoned, and that the language suggested by the American Bar Association for dealing with deadlocked juries should be used.[66] *Thomas* did require that future *Allen* charges conform to the ABA standard, but it specifically made its ruling prospective.[67] Therefore, although the instant case does contain references to the majority-minority viewpoints, it is not affected by *Thomas*.

Appellant objects to the charge as given because it allegedly coerced the jury into returning a verdict at the expense of those holding "minority views." It is important to note at the outset that the court gave this instruction as part of its original charge and not in a situation where the jury claimed it was deadlocked. As this Court has cogently noted:

> Whatever objections may be made to the *Allen* charge under certain circumstances, these objections have even less force when the *Allen* charge is given origi-

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your duty to decide the case if you can conscientiously do so" (Tr. 1913-1914). No mention was made of the other omission which is here claimed as error.

[64] See cases cited in *United States* v. *Thomas*, —— U.S. App. D.C. ——, ——, 449 F.2d 1177, 1188-1189 (1971) (*en banc*) (dissenting opinion of Robb, J.)

[65] 139 U.S. App. D.C. 193, 432 F.2d 626, *cert. denied*, 400 U.S. 949 (1970).

[66] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Trial by Jury* § 5.4 (Approved Draft 1968).

[67] *United States* v. *Thomas, supra* note 64, —— U.S. App. D.C. at ——, 449 F.2d at 1187.

> nally rather than later in an effort to pry a verdict out [of] a deadlocked jury.[68]

When the charge here was given, there was no "minority" to be coerced, a fact which gravely weakens appellant's argument.

The major function of the *Allen* charge is that of "counselling the jury to consult open-mindedly with a disposition to hearken to fellow jurors, and to agree when no violation of conscience is involved."[69] This is precisely what the court conveyed to the jury in its instruction. The ideas expressed by the two omitted sentences were clearly covered in other parts of the charge and in the instructions as a whole. Specifically, the first sentence which was omitted—"In a large proportion of cases absolute certainty cannot be expected"—was replaced by language far more beneficial to appellants. The language the court actually used at the beginning of its *Allen* charge[70] did precisely what appellant seeks in that it underscored the need for each juror to render a verdict individually and not merely to acquiesce in the conclusions of his fellow jurors. Similarly, the sentence "It is your duty to decide the case if you can conscientiously do so" was covered in substance by the rest of the court's *Allen* charge. Furthermore, appellant has not stated, and we cannot imagine, how the *absence* of this sentence was coercive. An equally good argument can be made that its presence would have been coercive.

### B. *There was no "prejudicial juxtaposition" of instructions.*

Appellant Knight's other objections deserve scant attention. He now claims for the first time on appeal that the

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[68] *United States* v. *Simpson*, *supra* note 55, 144 U.S. App. D.C. at 260, 445 F.2d at 736.

[69] *United States* v. *Johnson*, *supra* note 65, 139 U.S. App. D.C. at 200, 432 F.2d at 633.

[70] "[Y]our verdict must be the considered judgment of each juror. In order to return a verdict, it is neecssary that each juror agree on the verdict. Your verdict must be unanimous." (Tr. 1917.)

"juxtaposition" of the instructions on the testimony of an accomplice and on the testimony of a defendant "doubly" cautioned the jury about the weight to be given to his testimony. In sum, he claims that both instructions "applied to appellant Knight."[71] But, as even a very cursory reading of the record shows, this claim is totally without substance. Clearly the instruction on an accomplice's testimony was related to the testimony of Calvin Jones and Lynette Boone and had nothing whatsoever to do with any of the appellants. When the court instructed on the weight to be given to an accomplice's testimony, it prefaced its remarks by saying:

> I should charge you furthermore with respect to certain testimony from one of the government witnesses, Mr. Jones. Mr. Jones was an accomplice, by his own admission. (Tr. 1877).

That this instruction had no relevance to the defendants was again made abundantly clear when the court clarified some parts of its instructions at the prompting of counsel:

> [Y]ou will recall the charge I gave you with respect to Calvin Jones as an accomplice. I should have included Lynette Boone in the charge I gave before . . . (Tr. 1915).

The court then reread the entire instruction on accomplice testimony (Tr. 1915).

### C. *The trial court's instructions on aiding and abetting correctly defined the law.*

Appellant Knight's objection to the court's instructions on aiding and abetting is equally frivolous. The court gave the standard instruction[72] on aiding and abetting which

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[71] Appellant Knight's Brief at 20.

[72] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 47 (1966).

properly defines the law on the subject.[73] The instructions on aiding and abetting which were proffered by appellant Knight were, in part, an incorrect statement of law[74] and, where possibly correct,[75] were covered by the instruction given by the court (Tr. 1867-1868).[76] There is no error here.

## V. The two guns and ammunition found in appellant Johnson's possession when he was arrested a month after the robbery were properly admitted into evidence.

(Tr. 380-381, 411-413, 534, 685-690, 1027-1030, 1060-1065, 1072-1073, 1077-1078, 1177-1178)

Appellant Johnson claims that the trial court erred in admitting evidence that when arrested in Montreal, about a month after the robbery, he was found in possession of an M-1 carbine and a .38 caliber revolver and some boxes of ammunition (Tr. 685-690). He claims, without justification we submit, that this evidence had no probative value and was highly inflammatory.

The standard for determining legal relevancy is very broad. Wigmore has made it clear that:

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[73] *E.g., Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *United States* v. *Harris*, 140 U.S. App. D.C. 270, 284 n.40, 435 F.2d 74, 88 n.40 (1970), *cert. denied*, 402 U.S. 986 (1971)

[74] Appellant made the following request:

> Your honor [should] instruct that the knowing facilitation, that this alone is not enough and instruct that even if the jury finds that the defendant was practically certain that his conduct would facilitate the crime charged that that fact in itself would not be sufficient to permit them to infer that he intended to aid the crime (Tr. 1868.)

[75] "[I]f they find the defendant knew, that his aim was substantially to advance the criminal act or substantially similar aid was not otherwise available then you may infer that he intended to aid the crime." (Tr. 1868.)

[76] It is well settled that a party has no right to have instructions given in the language of his own choosing, and that on appeal the crucial question is whether the instructions as given were a correct statement of the law. *Agnew* v. *United States*, 165 U.S. 36 (1897); *Carter* v. *United States*, 138 U.S. App. D.C. 349, 427 F.2d 619 (1970); *Ramey* v. *United States*, 118 U.S. App. D.C. 355, 336 F.2d 743, *cert. denied*, 379 U.S. 840 (1964)

> [t]he evidentiary fact offered does not need to have strong, full, superlative, probative value, does not need to involve demonstration or to produce persuasion by its sole and intrinsic force, but merely to be worth consideration by the jury. It is for the jury to give it the appropriate weight in effecting persuasion.[77]

Clearly the proffered evidence by this standard was highly relevant. It is, of course, well established that a trial judge has wide latitude in ruling on the relevancy and materiality of evidence.[78] Where possibly inflammatory items are involved, the judge must weigh the probative value of such evidence against its tendency to create prejudice, and his ruling will rarely be disturbed on appeal except for a grave abuse of discretion.[79]

At trial there was testimony that a shotgun and a pistol were displayed openly during the robbery (Tr. 380-381, 411-413, 534). Mr. Arnold testified that appellant Johnson had his hand inside his coat pocket, possibly concealing yet another gun (Tr. 380). Most notably, appellants' accomplice, Calvin Jones, testified that Johnson did carry a weapon in his pocket and that the .38 caliber pistol found in Montreal was the same gun Johnson carried in the robbery (Tr. 1029-1030). Clearly the finding in Johnson's possession of a .38 caliber pistol—a pistol which one witness identified as the very same gun which was used in the robbery—was highly probative of whether Johnson was indeed one of the robbers and, if so, whether he or his

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[77] 1 WIGMORE, EVIDENCE § 29 (3d ed. 1940). See the broad definition of relevant evidence in Rule 401 of the Proposed Rules of Evidence for United States Courts, 51 F.R.D. 342 (1971):

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[78] *Hardy* v. *United States*, 118 U.S. App. D.C. 253, 254, 335 F.2d 288, 289 (1964); *United States* v. *Gipson*, 385 F.2d 341, 342 (7th Cir. 1967); *Wilson* v. *United States*, 250 F.2d 312, 325 (9th Cir. 1957).

[79] *United States* v. *Ravich*, 421 F.2d 1196, 1204-1205 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *Wangrow* v. *United States*, 399 F.2d 106, 115 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968).

companions were armed during the offense.[80] Moreover, even the gun and ammunition not identified as being used in the robbery were relevant and therefore admissible. Recently, in *United States* v. *Ravich,* the Second Circuit faced a factual situation very similar to that in the instant case. Three men held up a bank in Long Island City, New York. Six weeks later Ravich and a co-defendant were arrested in Baton Rouge, Louisiana, and charged with the robbery. A search of their two motel rooms and their car revealed a large amount of money, *six* .38 caliber pistols and several boxes of ammunition. The appellate court upheld the admission of this evidence even though only three of the guns could possibly have been used in the robbery. The court reasoned:

> [A] jury could infer from the possession of a large number of guns at the date of arrest that at least some of them had been possessed for a substantial period of time, and therefore that the defendants had possessed the guns on or before the date of the robbery. Direct evidence of such possession would have been relevant to establish opportunity or preparation to commit the crime charged, and thus would have tended to prove the identity of the robbers, the only real issue in this trial.[81]

Similarly, proof that appellant had the means to perpetrate an armed robbery soon after the offense was in fact committed is certainly some evidence that appellant did commit the robbery.[82]

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[80] *United States* v. *Cunningham,* 423 F.2d 1269, 1276 (4th Cir. 1970); *United States* v. *Ramey,* 414 F.2d 792, 794 (5th Cir. 1969); *United States* v. *Johnson,* 401 F.2d 746, 747-748 (2d Cir. 1968); *Banning* v. *United States,* 130 F.2d 330, 335-336 (6th Cir. 1942), *cert. denied,* 317 U.S. 695 (1943).

[81] *United States* v. *Ravich, supra* note 79, 421 F.2d at 1204 (citations omitted).

[82] *United States v. Trantham,* —— U.S. App. D.C. ——, ——, 448 F.2d 1036, 1038 (1971). In *Trantham* three men robbed a parking attendant. Only one gun was flashed during the robbery. When the defendants were arrested a few minutes later, two guns were recovered. Both were admitted into evidence at their joint trials. In holding their admission proper, this Court said,

Furthermore, in challenging the admission of the guns and ammunition appellant Johnson has failed to substantiate in any way his claim of unfairness. That the evidence may have been harmful to his defense is not, of course, the standard for determining prejudice.[83] It is inconceivable, in light of the facts before the jury,[84] that the admission of these items could have so inflamed the jury so as to deny appellant a fair trial.[85]

## VI. In no sense can it be said that the Government used perjured testimony merely because one of its witnesses was impeached by prior inconsistent statements.

(Tr. 1101-1102, 1183-1186, 1192, 1198-1200, 1249-1251)

Appellant Knight contends that he is entitled to a new trial simply because a portion of Calvin Jones' testimony before the grand jury was to some extent inconsistent with

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"It was a legitimate inference from the evidence that the occupants of the automobile were engaged in a joint criminal venture and this being so the Government was entitled to introduce the gun as part of their equipment for that venture." [Citation omitted.]

In *United States* v. *Baker*, 419 F.2d 83, 87 (2d. Cir. 1969), *cert. denied*, 397 U.S. 976 (1970), several defendants were convicted of various offenses related to the hijacking of a truck in October 1966. Some time after the hijacking, two guns were seized incident to defendant Baker's arrest. The court admitted both guns into evidence even though only one was identified as the gun used in the hijacking. The court reasoned: "[T]he two guns showed far more than general bad character or propensity to crime. Baker's possession of the guns proved that he was equipped to commit the very crime of which he was charged." *Accord*, *Wangrow* v. *United States*, *supra* note 79, 399 F.2d at 115. *See also Morton* v. *United States*, 87 U.S. App. D.C. 135, 183 F.2d 844 (1950); *Bayless* v. *United States*, 200 F.2d 113 (9th Cir. 1952), *cert. denied*, 345 U.S. 929 (1953); 1 WIGMORE, EVIDENCE §§ 83, 148 (3d ed. 1940).

[83] *See United States* v. *Edmons*, 432 F.2d 577, 586 (2d Cir. 1970).

[84] This crime was not a peaceful excursion in criminality but a bold, violent one. There was frequent testimony by the two complainants (Tr. 380-381, 411-413) and by Calvin Jones (Tr. 1027, 1029, 1060-1065, 1072, 1177-1178) that the robbers were armed.

[85] It is significant that the government's witness, Calvin Jones, was cross-examined about his own arrest and the guns discovered incident to that arrest (Tr. 1073, 1077-1078, 1127).

his testimony at trial. Appellant cites no authority, and we can find none, for this novel proposition; and we respectfully submit that this Court should view his argument, as do we, as totally without merit.

First of all, the two cases cited by appellant, *Napue* v. *Illinois* [86] and *Mesarosh* v. *United States*,[87] concern a problem not even remotely involved here. Both cases emphasize, in different contexts, a principle of law which the Government has little trouble accepting, that a conviction cannot be obtained through the knowing use of false evidence. The Supreme Court reversed Mesarosh's conviction under the Smith Act, 18 U.S.C. § 2385, when the Solicitor General conceded that a principal government witness had given bizarre and totally false testimony in other prosecutions of Communists. The nature of those fabricated statements, apparently discovered just prior to argument before the Supreme Court, completely destroyed the credibility of the witness. In *Napue* the Court reversed because, although the prosecutor had promised an accomplice leniency for testifying, he failed to correct that witness' statement at trial that no such promise had ever been made. That the situation here is totally dissimilar hardly needs to be stated.

We take issue preliminarily with the basic premise on which appellant Knight bases this argument: that Jones allegedly lied to the grand jury.[88] Calvin Jones' testimony before the grand jury and his statements given to the postal authorities were turned over to appellants during trial. These were used, fully and extensively, in an attempt to impeach Jones' credibility. But such impeachment or attempted impeachment is not an unexpected or unusual occurrence in the course of a criminal trial. The mere fact that a witness may be impeached to a degree by prior inconsistent statements does not mean that the Gov-

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[86] 360 U.S. 264 (1959).

[87] 352 U.S. 1 (1956).

[88] Significantly, nowhere does appellant Knight claim that Jones lied *at trial*. This being so, it is hard to imagine how his conviction was attained by the use of perjured testimony.

ernment has used perjured testimony as defined by *Napue* and *Mesarosh*.[89] Even the sturdiest of witnesses occasionally testifies inconsistently—to a greater or lesser degree—with his prior statements. As long as appellants had these prior statements at their disposal for use during cross-examination, their interests were fully protected.[90]

Admittedly there were a few inconsistencies between Jones' trial testimony and his prior statements, but there is no proof whatsoever, other than appellant's gratuitous assertions,[91] that Jones deliberately lied either before trial or during trial. Appellant cites five instances where Jones allegedly "lied" before trial in statements made to the grand jury and to the postal inspectors.[92] At least three of the alleged "lies" involved the failure of Jones to testify specifically before the grand jury about a matter he mentioned at trial (Tr. 1192, 1198, 1249-1251). Jones explained that the grand jury never asked the same questions which were asked at trial (Tr. 1199-1200), and that when not expressly questioned, he did not volunteer these details (Tr. 1192, 1199, 1249-1251). The other inconsistencies were also explained by Jones.[93] Of course, whether these explanations were adequate or convincing is not here relevant. As in any other trial where a witness is impeached by inconsistent or incomplete previous statements, the weight, if any, to be accorded the tarnished in-court testimony is for the jury to determine.[94] That the credibility of the govern-

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[89] *Link* v. *United States*, 352 F.2d 207 (8th Cir. 1965), *cert. denied*, 383 U.S. 915 (1966); *United States* v. *Passero*, 290 F.2d 238 (2d Cir.), *cert. denied*, 368 U.S. 819 (1961).

[90] *Link* v. *United States*, *supra* note 89, 352 F.2d at 211.

[91] *See Long* v. *United States*, 422 F.2d 1024, 1026 (9th Cir. 1970).

[92] Appellant Knight's Brief at 2.

[93] Before the grand jury Jones stated that he offered $18,000 to Mr. Arnold as he sat in the back of the mail truck. At trial Jones said that he offered "a couple of thousand [dollars]" (Tr. 1183) to Arnold. Jones explained this alleged "inconsistency" by stating, on cross-examination, that he "just grabbed a fistfull" of money without counting it (Tr. 1183-1186). Jones' testimony before the grand jury that he was the only one who had a firearm (Tr. 1101-1102) was, in all likelihood, merely a reference to the number of guns openly displayed (Tr. 1101-1102) at that time in the back of the truck.

[94] *Fletcher* v. *United States*, 334 F.2d 584, 588 (9th Cir.), *cert. denied*, 379 U.S. 948 (1964); *Hattem* v. *United States*, 283 F.2d 339, 343 (9th Cir. 1960),

ment's witnesses is ultimately a question for the jury to determine is axiomatic. Judge (now Chief Justice) Burger, writing for this Court, stated the maxim well in *Bush* v. *United States*:

> The traditional safeguards of the Anglo-American legal system "leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." [Citations omitted.] . . . Each witness appears before a jury on his own; jurors may believe or disbelieve, accept or discount, testimony on the basis of what the witness says and does or on the basis of impeachment evidence.[95]

To equate the impeachment of Jones with perjury necessitating reversal is a gross distortion of the record. At trial appellants apparently failed to convince the jury of Jones' incredibility; the jury's verdict should foreclose consideration of the issue by this Court.

## VII. The trial court properly admitted evidence that the fingerprint of Calvin Jones was found in the getaway vehicle and that, when arrested, Jones had money from the robbery in his possession. (Tr. 634-642, 1053-1054)

Appellants Knight and Johnson object to the admission of evidence (1) that Calvin Jones' fingerprints were found in the U-Haul truck used as the getaway vehicle, and (2) that when Jones was arrested in California, he had in his possession some of the money taken in the robbery. Citing the rule that prior consistent statements of a witness may not be introduced in evidence to corroborate his testimony,[96] appellants claim that this evidence was improperly admitted, to their prejudice. We disagree as to both items of evidence.

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[95] 126 U.S. App. D.C. 174, 176, 375 F.2d 602, 604 (1967). *See also United States* v. *Carter*, 144 U.S. App. D.C. 193, 195, 445 F2d 669, 671 (1971).

[96] Appellant Knight's Brief, at 24.

Appellee does not quarrel with the general proposition that when a witness' testimony is not impeached, his prior out-of-court *statements* are inadmissible.[97] However, appellants' reliance on this proposition is completely misplaced here. Nowhere does the record suggest that the government attempted to introduce prior consistent statements of Calvin Jones to buttress his in-court testimony. Rather, the evidence challenged here derives its admissibility from at least two other principles not alluded to by appellants at all, and totally unrelated to the law on prior inconsistent statements.

Calvin Jones testified that he was an actual participant in the robbery and that he received his share of the loot. The independent evidence that his fingerprint was found in the getaway vehicle and that he was found in possession of the stolen money corroborated that testimony. Clearly it is permissible to corroborate the testimony of a witness by other independent evidence as to any fact in issue in the case.[98] The government is not forced to rely on only one witness' assertions to prove its case. Moreover, it is perfectly permissible to strengthen a witness' testimony by proof tending to establish that the facts were as he has stated them.[99] The trial court was well within its discretion in admitting this evidence.

An additional reason for admitting it, equally compelling we submit, is that the evidence provided corroboration for the legally suspect testimony of an accomplice. It is well

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[97] All the cases cited by appellants stand for that proposition. *E.g.*, *Coltrane* v. *United States*, 135 U.S. App. D.C. 295, 418 F.2d 1131 (1969); *Gregory* v. *United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966); *Johnson* v. *United States*, 121 U.S. App. D.C. 19, 347 F.2d 803 (1965).

[98] *See Laughlin* v. *United States*, 128 U.S. App. D.C. 27, 33, 385 F.2d 287, 293 (1967), *cert. denied*, 390 U.S. 1003 (1968); *Gaynor* v. *Atlantic Greyhound Corp.*, 183 F.2d 482 (3d Cir. 1950); *Railway Express Agency* v. *Mackay*, 181 F.2d 257, 262 (8th Cir. 1950); 98 C.J.S. *Witnesses* § 472 (1957).

[99] *Laughlin* v. *United States*, *supra* note 98; *Abraham* v. *Gendlin*, 84 U.S. App. D.C. 307, 309, 172 F.2d 881, 883 (1949); *United States* v. *Hoffa*, 349 F.2d 20, 40 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966); *Velasquez* v. *United States*, 244 F.2d 416, 419 (10th Cir. 1957); *Hilliard* v. *United States*, 121 F.2d 992, 997 (4th Cir.), *cert. denied*, 314 U.S. 627 (1941); 98 C.J.S. *Witnesses* § 648 (1957).

recognized that the testimony of an accomplice should be received with caution and scrutinized with care by the jury.[100] The members of the jury were specifically instructed not only that they must carefully scrutinize Calvin Jones' testimony but that they could convict appellants on the uncorroborated testimony of Jones only if they believed his testimony proved appellants' guilt beyond a reasonable doubt (Tr. 1878, 1915-1916). With the jury so cautioned, it certainly was a proper tactic for the government to attempt to provide the necessary corroboration which would support and strengthen Jones' testimony.[101] Appellants have no basis for complaint here.

## VIII. The trial court properly limited cross-examination of a government witness on the highly prejudicial and competely unsubstantiated claim that he was a collaborator in the robbery.

(Tr. 134-135, 203-224, 560-562, 1080-1091, 1754-1761)

Appellants Johnson and Knight claim that they were denied effective cross-examination of both Calvin Jones and one of the complainants, David Rice. They claim that they should have been permitted to examine Rice on his alleged collaboration in the robbery and to examine Calvin Jones on his knowledge of Rice's alleged complicity. Although we recognize that cross-examination is indeed an important right, nevertheless this type of cross-examination was properly limited by the trial court, for there existed no basis in fact to support the innuendoes and suggestions which would have been sown in the minds of the jury merely by asking Rice if he was an accomplice.

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[100] *Surratt* v. *United States*, 106 U.S. App. D.C. 49, 269 F.2d 240 (1959); *Bishop* v. *United States*, 100 U.S. App. D.C. 88, 243 F.2d 32 (1957); *McQuaid* v. *United States*, 91 U.S. App. D.C. 229, 198 F.2d 987 (1952), *cert. denied*, 344 U.S. 929 (1953).

[101] *United States* v. *Gulley*, 404 F.2d 534, 536 (7th Cir. 1968); *State* v. *Flowers*, 1 N.C. App. 612, ——, 162 S.E.2d 34, 35 (1968); *State* v. *Emrich*, 361 Mo. 922, ——, 237 S.W.2d 169, 173 (1951); *see* 23 C.J.S. *Criminal Law* §§ 809, 812 (1) (1961).

At a pre-trial hearing on a motion to suppress the identification of appellants Kirkland and Johnson, Rice admitted that originally both he and the driver, Mr. Arnold, were prime suspects in the robbery (Tr. 134-135). However, he was assured later by the postal authorities that he had been cleared of suspicion (Tr. 135). After the hearing, Kirkland's counsel indicated to the court *in camera* that he had a report "not wholly or even partially substantiated by me" (Tr. 203) that Mr. Rice was a collaborator in the robbery (Tr. 203-224). During this discussion the prosecutor proffered that there had been an extensive investigation by the postal authorities of Rice, and indeed of many other people inside the post office, as to possible complicity. The prosecutor stated:

> He [Rice] was thoroughly checked out. There was never anything substantiated, and the matter was dropped after he took a lie detector test and passed with flying colors. I should say it was probably dropped before then. The results of the investigation by the Post Office personnel have led them to conclude that Mr. Rice is free of any complicity in this affair. (Tr. 207.)

The prosecutor offered to have the postal inspector corroborate his statements, but this was deemed unnecessary by appellants (Tr. 212, 223). After this discussion, it was agreed that the trial would proceed, but that if appellants could supply any information tending to *substantiate* their serious allegations, the court would provide an opportunity to explore the charge (Tr. 222, 224).

At trial, during the cross-examination of Rice, the court sustained the government's objection to any inquiry into Rice's alleged complicity without any basis other than pure speculation to substantiate such a charge (Tr. 560, 562). Later during cross-examination of Calvin Jones by Kirkland's counsel, the following colloquy took place:

> Q. Did Mr. Kirkland ever tell you who the inside man was?
> A. No, he didn't.

> Q. Did you think the fact that they told you you didn't have to have a shell in your gun was in any way related to the fact that one of the two men [on the mail truck] was an inside man?
> MR. GREEN [the prosecutor]: I object. (Tr. 1081.)

Again the court precluded further inquiry into the matter of Rice's complicity since there was no basis in fact for the insinuations raised by Kirkland's questions (Tr. 1081, 1085, 1090-1091). Still later, the court forbade recalling Mr. Rice to inquire further into his alleged complicity when the only witness who, it was claimed, could substantiate these charges refused to testify, invoking his privilege against self-incrimination (Tr. 1754-1755, 1761). We submit that the trial court was entirely correct in so limiting this type of highly prejudicial cross-examination.

Cross-examination has, of course, long been recognized as an important right afforded to all parties.[102] It is equally axiomatic that counsel has no right to unlimited cross-examination on any subject for any length of time. Regulation of the extent and scope of cross-examination must generally lie within the discretion of the trial court, and reversal is warranted only when an abuse of discretion leads to prejudice.[103] No error can be assigned to the trial court's limitation of Calvin Jones' cross-examination, since he had already been examined on the issue to the full extent of his knowledge. He testified that he thought that there were "insiders" but that he did not know who they were (Tr. 1080-1081). Necessarily this should have ended the inquiry. Any further inquiry of Jones as to Rice's involvement certainly would have been fruitless and highly speculative.[104]

Our objection to the proposed cross-examination of Mr.

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[102] *E.g.*, *Alford* v. *United States*, 282 U.S. 687 (1931); *United States* v. *Pugh*, 141 U.S. App. D.C. 68, 436 F2d 222 (1970).

[103] *Alford* v. *United States*, *supra* note 102; *Howard* v. *United States*, 128 U.S. App. D.C. 336, 341, 389 F.2d 287, 292 (1967).

[104] Arguably, by asking Jones if the unloaded gun did not suggest to Jones that one of the postal employees might have been a collaborator, counsel achieved all he could have hoped for, *i.e.*, he raised the *possibility* that Rice was involved.

Rice on this matter stands on a different footing. First, the questions sought to be asked were highly prejudicial and tended to cast the witness in a most unfavorable light. The mere asking of the question, "Weren't you involved in this robbery, Mr. Rice?", would have unnecessarily tended to debase Mr. Rice in the eyes of the jury. Clearly, where the "illegitimate propensities" loom so large, the court must take special care to protect the witness from unnecessary harassment.[105] In addition, this examination was properly barred because counsel for appellants had no means whatsoever to support the insinuations raised by the mere asking of the questions. It is well established that it is improper to ask a question on cross-examination when there exists no basis in fact for the insinuations raised by the questions, especially where the matter inquired into is highly inflammatory.[106] Wigmore has commented forcefully on this type of tactic:

> The jury may under certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question. When a counsel puts such a question, believeing that it will be excluded for illegality or will be negatived, and also having no reason to believe that there is a foundation of truth for it, he violates professional honor.[107]

Likewise, Judge (now Chief Justice) Burger has vigorously condemned the practice of defense counsel who ask inflammatory questions with no intention, or ability, to prove the facts adumbrated by the questions:

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[105] *See Tinker* v. *United States*, 135 U.S. App. D.C. 125, 417 F.2d 542, *cert. denied*, 396 U.S. 864 (1969).

[106] *Jennings* v. *United States*, 364 F.2d 513, 516 (10th Cir. 1966), *cert. denied*, 385 U.S. 1030 (1967); *Brown* v. *United States*, 222 F.2d 293, 298 (9th Cir. 1955); *United States* v. *Perlstein*, 120 F.2d 276, 283-284 (3d Cir. 1941); *Leon* v. *United States*, 136 A.2d 588 (D.C. Mun. Ct. App. 1957); *People* v. *Hamilton*, 60 Cal. 2d 105, ——, 383 P.2d 412, 429, 32 Cal. Rptr. 4, 21 (1963); *People* v. *Miller*, 211 Cal. App. 2d 569, ——, 27 Cal. Rptr. 290, 294-295 (1963).

[107] 6 WIGMORE, EVIDENCE § 1808(2) (3d ed. 1940).

> Counsel asking such questions with no intention of following them up if the answers were negative would be subject to severe censure.[108]

In *Lee Won Sing* v. *United States* [109] the prosecutor asked a defense witness, who had been originally a co-defendant but had pleaded guilty prior to trial, "Isn't it a fact that the defendant gave you $20,000 to plead guilty in this case?" This Court held that the question could not properly be asked "unless the prosecutor had evidence of or reasonable ground to believe the truth of its implication." [110] In view of the "highly prejudicial character of the question," the Court found unpersuasive the government's reliance on an anonymous letter to the police to the effect that the witness had been paid as support for its inquiry into the matter. The proposed inquiry in the instant case was certainly as egregious as that held to be reversible error in *Lee Won Sing*. Surely it would have been most improper for the court to permit appellants to ask Mr. Rice if he was in fact a collaborator in the robbery, knowing full well that the Government had exhaustively investigated Mr. Rice and found him innocent, and knowing also that not one iota of extrinsic evidence was available to support the insinuation raised by asking the question. Had the question actually been asked of Mr. Rice, it no doubt would have been quickly answered in the negative. Thereafter, however, the insinuation would have remained alive not only to the detriment of the Government but also to the detriment of the maligned witness.

*United States* v. *Pugh, supra* note 102, is not to the con-

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[108] *Jackson* v. *United States*, 111 U.S. App. D.C. 353, 356, 297 F.2d 195, 198 (1961) (concurring opinion). *See* A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *The Defense Function* § 7.6(d), at 274 (Approved Draft, 1971):

> The attempt to communiacte impressions by innuendo through questions which are answered in the negative, for example, "Have you ever been convicted of the crime of robbery?" or "Weren't you a member of the Communist Party?" or Did you tell Mr. X that . . .?" when the questioner has no evidence to support the innuendo, is an improper tactic which has often been condemned by the courts. [Citations ommitted.]

[109] 94 U.S. App. D.C. 310, 215 F.2d 680 (1954).

[110] *Id.* at 311, 215 F.2d at 681.

trary. In *Pugh* counsel's questioning of a government witness about whether he actually had a rendezvous with a female rather than a male friend prior to being robbed was certainly innocuous compared with the allegation of criminality which was attempted to be raised in the instant case. Furthermore, counsel in *Pugh* did not have benefit of a full and complete proffer by the government—a proffer fully capable of corroboration—that the question sought to be asked would be answered in the negative. Additionally, the matter at issue there had been specifically raised by the Government on direct examination, and therefore the questions on cross-examination about the same subject matter were held to be proper.[111] And finally, although this Court in *Pugh* found error in the limitation of cross-examination, it found the error to be harmless.

In sum, we submit that there was no error in the court's limiting cross-examination which sought to insinuate criminality on the part of a government witness based on nothing more than the self-serving accusations of appellants themselves.[112]

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

HAROLD H. TITUS, JR.,
*United States Attorney.*

JOHN A. TERRY,
DAVID G. LARIMER,
*Assistant United States Attorneys.*

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[111] *United States* v. *Pugh*, *supra* note 102, 141 U.S. App. D.C. at 70, 436 F.2d at 224.

[112] Appellant Knight also claims error in that the trial court prevented him from showing what a wholesome place the African Hut was. Although we believe that the court was well within the bounds of its discretion in ruling that extensive testimony on that subject was irrelevant (Tr. 1476-1477), appellant Knight's argument is best disposed of by pointing out that the nature and purpose of the African Hut was made quite clear throughout the trial (Tr. 1475, 1478-1479, 1505, 1515, 1665). To the extent that the character of the African Hut was relevant at all, it was fully brought to the attention of the jury.

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# REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,772

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UNITED STATES OF AMERICA, Appellee,

v.

ARTHUR B. KNIGHT, Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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MICHAEL MULRONEY
Counsel for Appellant
(Appointed by the Court)

Cr. No. 525-70

# CITATIONS



References to Rulings: None.

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* Cases and rulings principally relied on are marked by asterisks.

This case has not previously been before this Court under any other name or title.

IN THE
UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, Appellee,

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Appeal from the United States District Court
for the District of Columbia

# REPLY BRIEF FOR APPELLANT

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## ARGUMENT

Appellant Knight and the appellee are fairly met on most of the issues raised in the appellant's opening brief. The following points deserve elaboration.

1. The appellant was convicted of both mail robbery and armed robbery on the basis of a single act. United States v. Spears, _____U.S. App. D.C._____, 449 F.2d 946 (1971) held that a defendant could not be convicted simultaneously of an attempt to rob a mail carrier under 18 U.S.C. §2114 and of armed robbery under the District of Columbia robbery and crime of violence statutes. The Court reasoned that the attempt was an integral part of the robbery. The government

tries to limit that reasoning by arguing (Br. 20-21) that the attempt portion of §2114 is simply a lesser included offense of the crime arising under that section. In doing so, the government ignores completely the plain import of Spears: in this jurisdiction, a mail robbery attempt merges into D.C. Code armed robbery of a mail custodian. If that is so, there is necessarily an equivalence between mail robbery and armed robbery, where an armed theft of mail matter occurs. Under the facts in Spears and here, if the equivalence between armed robbery and mail robbery was not complete, this Court could not have said that an attempted mail robbery merged into a completed armed robbery of a mail carrier. See Spears, supra, 449 F.2d at 954.[1/]

2. The government argues (Br. 18) that even if mail robbery and armed robbery are coincident, the appellant capriciously asks the Court to strike down the conviction which gives rise to the longest sentence. It appears that when Congress legislates generally concerning a genus, but specifically concerning one of its species, the more specific classification prevails. See United States v. Mori, 444 F.2d 240 (5th Cir. 1971). Accordingly, should this Court agree that simultaneous convictions are improper, but that no other error occurred, then the mail robbery conviction should stand and the case should be remanded for sentencing anew.

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1/ Inadvertently, the appellee suggests (Br. 17-18) that the propriety of simultaneous conviction under both statutes is now raised for the first time in this case. On the contrary, that point was argued to the trial court. (Tr. 1862-1864)

3.*/ The government contends that the court below properly prohibited cross examination of Rice, the mail truck guard, on the question of his complicity in the crime. That prohibition was proper, the government says (Br. 42-44), because the prosecution had satisfied itself that Rice was not involved in the crime. The trial court accepted the government's bland assurance and barred cross examination in the absence of extrinsic evidence of Rice's involvement. (Tr. 207-209, 223) To understate the matter somewhat, the prosecution's determination -- however earnest and thorough -- that Rice was not involved is no substitute for cross examination. Extrinsic evidence was not a necessary prerequisite to the cross examination sought.

Presumably, defense counsel had two proper aims in view in seeking to determine whether Rice was a participant; first, to establish the witness' bias and second, to establish his complicity.

If Rice was a participant, he had an obvious stake in the testimony. This Court recognizes that bias of a witness "is always relevent". Villaroman v. United States, 87 U.S. App. D.C. 240, 184 F.2d 261, 262 (1950). Bias may be shown "either by cross examination or by extrinsic evidence***". (Emphasis added.) Austin v. United States, 135 U.S. App. D.C. 240, 418 F.2d 456, 459 (1969). The use of the disjunctive in Austin

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*/ Tr. 204, 207-209, 212, 221, 233, 560, 1080-1083, 1084-1089, 1750, 1752-1756, 1761.

indicates that cross examination is available in the absence of extrinsic evidence. The rule is that such cross examination is a right of the defense. Tinker v. United States, 135 U.S. App. D.C. 125, 417 F.2d 542, 544 (1969); Wynn v. United States, 130 U.S. App. D.C. 60, 397 F.2d 621, 623 (1967); and see Tr. 1081-1082. The defense has great latitude on cross examination, as the facts in the Tinker and Austin cases show. The trial court should limit cross examination only after the accused "has been afforded a reasonable opportunity to make the point***". Austin v. United States, supra, 418 F.2d at 459. Here, no such opportunity was afforded defense counsel.[2/]

If Rice was an accomplice, the indictment was faulty for it named only Rice as custodian of the mail, as the court recognized (Tr. 221; and see Brief for Appellant (Knight) 13-15) Cross examination to establish complicity need not be based on a predetermined fact. A well-reasoned suspicion on the part of trial counsel suffices so long as it is neither an improbable flight of fancy nor utterly implausible. See United States v. Pugh, 141 U.S. App. D.C. 68, 436 F.2d 222, 225 (1970) But even assuming that some affirmative showing is necessary to permit cross examination as to complicity, more than enough was shown here. It was plain that an inside man was involved. (See Tr. 1080-1081; Brief for Appellant (Knight) 10-13) The prosecutor and the court were aware that

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2/ On brief, the government contends (Br. 44, n. 104) that Jones was cross examined on this point sufficiently to raise the possibility of Rice's involvement. One question (Tr. 1081) certainly cannot be deemed adequate cross examination.

Rice may have been in contact with several of the defendants prior to the robbery, that Rice admitted visiting the African Hut, which the government points to as an iniquitous place (Brief for Appellee, 47, n. 112), and that Rice once worked in the Post Office with Collins, the alleged originator of the theft plan who took the Fifth Amendment rather than testify concerning his knowledge of Rice's supposed involvement. (Tr. 207-208, 1084-1089, 1752-1756, 1761) One of the defense counsel, in good faith, indicated that he had information that Rice "was likely a confederate in this robbery". (Tr. 560) It seems apparent from the record that the information came from his client. (Tr. 204, 208, 209, 212, 1083) In the face of that, the trial court declined to let Rice be cross examined on the ground that no extrinsic proof of his involvement could be shown. (See Tr. 1750) The court's bar to the cross examination of Rice is contrary to Austin, and fatally prejudicial to the appellant.[3/] See Lindsey v. United States, 106 U.S. App. D.C. 342, 133 F.2d 368 (1942)

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[3/] Appellant Knight's case hung in delicate balance. (See Tr. 1412, 1460) Cross examination of Rice might have tipped it in Knight's favor. For example, Lynette Boone testified that when the loot was divided up, two piles were set aside for someone in addition to Kirkland, Jones and Johnson. (Tr. 1306, 1309) The prosecution (Tr. 1266, 1268), and the government here (Br. 17), suggest that those two piles were for Knight and Bowman. With Bowman's acquittal, it is apparent that the jury felt one of the piles was not his. If Rice's testimony -- oral and demeanor -- had been unconvincing to the jury, they could have viewed the extra pile as slated for Rice.

The court's failure to permit Rice's cross examination cannot be defended on the ground that there was a probability that no affirmative inculpatory statement would be forthcoming. Rice could not claim the privilege against self-incrimination. Ellis v. United States, 135 U.S. App. D.C. 35, 416 F.2d 791 (1969). And it is possible that any denial by him of complicity would be sufficiently evasively expressed that his demeanor would call his testimony into question in the jury's mind.

4.*/ Appellant Knight argues that his case should have been severed from those of the other defendants (Br. 15-19). The government responds by suggesting that Knight's trial counsel did not move for severance. Hence, the argument runs, severance could only have come from the court sua sponte, a result which may carry with it a heavier burden than consideration of the matter on motion. It is quite true that Knight's trial counsel did not in terms move for severance, but counsel for the co-defendants did. (Tr. 7) It plainly appears that the ground rules for the joint trial were that a motion or objection made by one counsel pertained to all (Tr. 1146, 1269, 1466, 1862), and the case for severance of Knight was effectively made -- by government counsel (Tr. 16-19) -- as well as by Knight's counsel (Tr. 21).

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*/ (Tr. 7, 16-19, 21, 1146, 1265-1269, 1305, 1309, 1359, 1412, 1460, 1466, 1862)

Appellant Knight contends (Br. 15-19) that he was prejudiced by the lurid details of his co-defendants' activities, in which he did not participate, but he was prevented from distinguishing himself from those exploits before the jury. In response the government says, simply, that Knight would not have been able to argue to the jury about his co-defendants' exploits and failure to testify had he been separately tried. (Brief for Appellee 14-15) True, but in that event, Knight's counsel could have dwelt on the fact that he did testify, a crucial argument in a close case (Tr. 1412, 1460) that was denied him here, and many of the gamy portions of the evidence would not have been before the jury because they would have been inadmissable as to Knight alone. Furthermore, the joint trial format prevented Knight's counsel from effectively cross examining witnesses who would not have appeared had Knight been on trial alone. For example, Lynette Boone testified that she saw the money divided among Kirkland, Jones and Johnson, with two other shares to be disbursed later. (Tr. 1305, 1309) One of those shares she was told was set aside for Bowman (Tr. 1268), and the other was for none of the robbers. (Tr. 1359) Knight's counsel was unable to pursue the matter, however, in the context of a joint trial. (Tr. 1265-1269)

5. The appellee (Br. 36-39) incorrectly attributes to Knight the contention put forward by Kirkland relating to the sometimes divergent paths Calvin Jones' testimony followed. (See Brief for Appellant (Kirkland) 2 - 3)

## CONCLUSION

For the reasons stated:

(a) If the Court agrees that it is inappropriate in this case to permit simultaneous convictions for armed robbery and mail robbery but rejects appellant's remaining contentions, his conviction for armed robbery should be dismissed and the case remanded to the trial court for re-examination of the sentence in the light of the fact that appellant stands convicted of a single felony.

(b) If the Court agrees with any one of the other points raised by appellant, the case should be reversed and remanded for a new trial.

Respectfully submitted,

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Counsel for Appellant
(Appointed by the Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this reply brief has been served on the office of the United States Attorney for the District of Columbia this _____ day of February, 1972, and that copies have been mailed, postage prepaid to the following:

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